

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Plaintiff in Error,

vs.

GERTRUDE WRIGHT and ORENE WRIGHT  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Defendants in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court of the  
Southern District of California, Northern Division.

Filed

MAR 7 - 1917

F. D. Monckton,  
Clerk.



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the District Court of the United States, Southern  
District of California, Northern Division.*

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Plaintiff in Error,

vs.

GERTRUDE WRIGHT and ORENE WRIGHT,  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,

Defendants in Error.

**Writ of Error.**

United States of America,—ss.

The President of the United States, to the Honor-  
able, the Judge of the District Court of the  
United States for the Southern District of Cali-  
fornia, Northern Division, GREETING:

Because in the record and proceedings, as also in  
the rendition of the judgment of a plea which is in  
said District Court before you, or some of you, be-  
tween the Southern Pacific Company, plaintiff in  
error, and Gertrude Wright and Orene Wright and  
Ora Wright, by Gertrude Wright, their guardian  
*ad litem*, defendants in error, a manifest error hath  
happened, to the great damage of said Southern Pa-  
cific Company, plaintiff in error, as by its complaint  
appears;

We, being willing that error, if any hath been,  
should be duly corrected, and full and speedy jus-  
tice done to the parties aforesaid in this behalf, do  
command you, if judgment be therein given, that

then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you may have the same at the city and county of San Francisco, in the State of California, on the 28th day of December next, in the said Circuit Court of Appeals, to be then and there held, that the [4\*] record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, the 28th day of November, 1916.

[Seal] WM. M. VAN DYKE,  
Clerk of the District Court of the United States,  
Southern District of California, Northern Division.

Writ allowed:

OSCAR A. TRIPPET,  
Judge.

I hereby certify that a copy of the within Writ of Error was, on the 28th day of November, 1916, lodged in the clerk's office of the said District Court of the United States, in and for the Southern Dis-

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\*Page-number appearing at foot of page of original certified Transcript of Record.



trict of California, Northern Division, for the said defendants in error.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States, in  
and for the Southern District of California,  
Northern Division.

By R. D. Zimmerman,

Deputy Clerk. [5]

[Endorsed]: No. 71—Civil. In the District Court  
of the United States, Southern District of California,  
Northern Division. Gertrude Wright et al.,  
Plaintiffs, vs. Southern Pacific Company, Defendant.  
Writ of Error. Filed Nov. 28, 1916. Wm. M. Van  
Dyke, Clerk. By R. D. ZIMMERMAN, Deputy  
Clerk. [6]

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*In the District Court of the United States, Southern  
District of California, Northern Division.*

SOUTHERN PACIFIC COMPANY, a Corporation,  
tion,

Plaintiff in Error,

vs.

GERTRUDE WRIGHT and ORENE WRIGHT  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Defendants in Error.

**Citation on Writ of Error.**

United States of America,—ss.

The President of the United States to Gertrude Wright and Orene Wright and Ora Wright, by Gertrude Wright, Their Guardian *ad Litem*, and Messrs. Gallaher & Aten and Frank Kauke, Esq., Their Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, on the 28th day of December, 1916, pursuant to a writ of error on file in the clerk's office of District Court of the United States, in and for the Southern District of California, Northern Division, in that certain action, No. 71—Civil, wherein the Southern Pacific Company is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment given, made and entered against the said Southern Pacific Company in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable OSCAR A. TRIPPET, United States District Judge for the Southern District of California, and one of the judges of the District Court of the United States in and for the Southern District of California, Northern Division, this 28th day of November, 1916, and the Independ-

ence of the United States the one hundred and forty-first.

OSCAR A. TRIPPET,  
United States District Judge for the Southern District of California. [7]

Service of the within citation, and receipt of a copy thereof admitted this 1st day of December, 1916.

GALLAHER & ATEN,  
FRANK KAUCHE,

Attorneys for Defendants in Error. [8]

[Endorsed]: No. 71—Civil. In the District Court of the United States, Southern District of California, Northern Division. Gertrude Wright et al., Plaintiffs, v. Southern Pacific Company, Defendant. Citation. Filed Dec. 6, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [9]

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**Names and Addresses of Attorneys.**

For Plaintiff in Error:

L. L. CORY, Esq., 410-414 Cory Building,  
Fresno, California.

For Defendants in Error:

GALLAHER & ATEN, and FRANK KAUCHE,  
Esq., Fresno, California. [10]

*In the District Court of the United States of America, in and for the Southern District of California, Northern Division.*

No. 71—CIVIL.

GERTRUDE WRIGHT, and ORENE WRIGHT,  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,  
Defendant. [11]

*In the Superior Court of the County of Fresno, State of California.*

GERTRUDE WRIGHT, and ORENE WRIGHT,  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,  
Defendant.

### **Complaint.**

The plaintiffs complain of the defendant and allege:

#### **I.**

That said defendant is now, and at and during all

the times herein mentioned has been, a corporation duly organized and existing as such under and by virtue of the laws of the State of Kentucky.

## II.

That the plaintiffs Orene Wright and Ora Wright are minors, each of whom is under the age of 14 years; that the said Orene Wright is of the age of 13 years, and that the said Ora Wright is of the age of 11 years; that the plaintiff Gertrude Wright is the mother of said minors, and that at the beginning of this action said Gertrude Wright has made application to be appointed the guardian *ad litem* of said minors for the purpose of prosecuting and conducting this action, and that said application has been granted, and by an order of this Court duly given, made and entered herein, the said Gertrude Wright has been appointed and now is the duly qualified and acting guardian *ad litem* of the said Orene Wright and Ora Wright, minors, plaintiffs in this action. [12]

## III.

That on the 22d day of May, 1914, the defendant, Southern Pacific Company, a corporation, was in the possession of a certain railroad in the city of Selma, county of Fresno, State of California, commonly known as the Southern Pacific Railroad, together with the tracks and rolling-stock and other appurtenances thereunto belonging, and was, on the said 22d day of May, 1914, operating, maintaining and controlling the said railroad, and the locomotives, cars and other rolling-stock thereon, and said loco-

motives, cars and other rolling-stock were then and there propelled by steam.

#### IV.

That on the 22d day of May, 1914, one George R. Wright, a man 37 years of age, was riding on a certain automobile truck, and was traveling along and upon a certain street in the said city of Selma, which said street is known as an extension of Arrants Street, and the same crosses the track of the railroad aforesaid at a point between East Front Street and West Front Street, in the said city of Selma, and which said so-called extension of Arrants Street then and there was and for a long time theretofore had been and now is a public highway at such point of crossing. That as the said George R. Wright on said day, while so traveling on said extension of Arrants Street, attempted to cross said railroad track, and as he was then and there passing onto and attempting to cross said railroad track, the said defendant, through its agents and servants, then and there acting within the scope of their employment, so carelessly and negligently operated one of defendant's locomotives on said railroad, that said locomotive ran into and upon and collided with said automobile truck, in which said automobile truck the said George R. Wright was then and there riding, in consequence of which said George R. Wright was then and thereby thrown [13] violently from said automobile truck and he was then and there, solely by reason of the fault and negligence of the said defendant, maimed and killed.

#### V.

That the plaintiffs, Gertrude Wright, Orene



Wright and Ora Wright, are heirs at law, and are all of the heirs at law of said George R. Wright, deceased; that the plaintiff Gertrude Wright is 31 years of age, and is the surviving wife of said George R. Wright, deceased; that the plaintiffs Orene Wright and Ora Wright are children of the said George R. Wright, deceased; that the plaintiffs were at the time of the death of the said George R. Wright dependent upon him for support and maintenance, and were entitled to the continuous support, maintenance, society, comfort and protection at the hands of the said George R. Wright, and would now be entitled to and would receive from the said George R. Wright, were he now living, all such support, maintenance, society, comfort and protection, and of all which the plaintiffs and each of them have been and are deprived by the death of the said George R. Wright, as hereinabove alleged. That in his lifetime the said George R. Wright was a hard-working sturdy, robust man, and he was 37 years of age at the time of his death, and he was earning and capable of earning about \$200 per month in the business in which he was engaged at the time of his death, to wit, the draying and transfer business.

## VI.

That on account of the death of the said George R. Wright, so caused by the carelessness and negligence of the said defendant, as aforesaid, plaintiffs have suffered damages in the sum of \$35,000.

WHEREFORE, plaintiffs pray for judgment against the said defendant in the sum of \$35,000 and for costs of suit.

GALLAHER & ATEN,  
FRANK KAUKÉ,  
Attorneys for Plaintiffs. [14]

State of California,  
County of Fresno,—ss.

Gertrude Wright, being duly sworn, deposes and says: That she is one of the plaintiffs in the above-entitled action; that she has heard read the annexed and foregoing complaint and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that she believes it to be true.

GERTRUDE WRIGHT.

Subscribed and sworn to before me this 4th day of May, 1915.

[Seal] IRVINE P. ATHEN,  
Notary Public in and for the County of Fresno, State of California.

[Endorsed]: 18,238. Filed May 4, 1915. D. M. Barnwell, Clerk. By Louis F. Ryan, Deputy. [15]



*In the Superior Court of the County of Fresno, State  
of California.*

GERTRUDE WRIGHT, and ORENE WRIGHT,  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Plaintiffs,

v.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

**Demurrer.**

Now comes the defendant and does demur to the  
Complaint of the plaintiffs herein for the following  
reasons, to wit:

I.

That said Complaint does not state facts sufficient  
to constitute a cause of action against said defend-  
ant.

II.

That said Complaint is uncertain in this, in that  
it cannot be determined therefrom how, or in what  
respect, the defendant, or any of its employees, was  
negligent, or in what respect one of the defendant's  
locomotives was in any manner carelessly or negli-  
gently operated, or in what such carelessness or neg-  
ligence consisted.

L. L. CORY,

Attorney for Defendant.

[Endorsed]: 18,238. Filed Jun. 4, 1915. D. M.  
Barnwell, Clerk. By Louis F. Ryan, Deputy. [16]

*In the Superior Court of the County of Fresno, State  
of California.*

No. 18,238.

GERTRUDE WRIGHT, and ORENE WRIGHT,  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

**Notice of Petition for Removal.**

To the Above-named Plaintiffs, and to Messrs. Gallaher & Aten and Frank Kauke, Attorneys for Plaintiffs:

You and each of you will please take notice that Southern Pacific Company, defendant in the above-entitled action, will on the 4th day of June, 1915, at 10 o'clock A. M., petition the above-entitled court to remove said cause to the District Court of the United States in and for the Northern Division of the Southern District of California, by filing a petition and bond, copies of which are hereto attached and made a part hereof, and reference to which is hereby made for further particulars.

Dated June 3d, 1915.

L. L. CORY,  
Attorney for Petitioner.

[Endorsed]: 18,238. Filed Jun. 4, 1915. D. M. Barnwell, Clerk. By Louis F. Ryan, Deputy. [17]

*In the Superior Court of the County of Fresno, State  
of California.*

No. 18,238.

GERTRUDE WRIGHT, and ORENE WRIGHT,  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

**Petition for Removal of Cause to United States  
District Court.**

To the Honorable, the Superior Court of the County  
of Fresno, State of California:

Your petitioner, Southern Pacific Company, re-  
spectfully shows:

I.

That it is the defendant in the above-entitled suit  
or action. That said suit, as appears from the com-  
plaint, is of a civil nature at law, brought by plain-  
tiffs to recover judgment against defendant, your  
petitioner, in the sum of thirty-five thousand dollars  
(\$35,000) and costs of suit, which claim your peti-  
tioner wholly contests and denies, and alleges that  
the amount involved in said action, exclusive of in-  
terest and costs, exceeds the value of three thousand  
dollars (\$3,000).

II.

That at the time of the commencement of said suit,

said Southern Pacific Company, your petitioner, was, ever since has been and still is, a railroad corporation, incorporated and existing under the laws of the State of Kentucky, and a citizen and [18] resident of said State, and a nonresident of the State of California. That at the time of the commencement of said suit, plaintiffs and each of them were, ever since have been and now are, citizens of the State of California, and residents of the Southern District of said State.

### III.

That at the time of the commencement of said suit there was, ever since has been and still is therein, a controversy wholly between citizens of different States, which can be fully determined between them—that is to say, between plaintiffs, Gertrude Wright, and Orene Wright, and Ora Wright, by Gertrude Wright, their guardian *ad litem*, and Southern Pacific Company, defendant and petitioner herein.

### IV.

That service of summons was made in said suit on your petitioner on the 5th day of May, 1915, and not before said day, in the city and county of San Francisco, State of California, and your petitioner is not required, by the laws of the State of California or the rules of the above-named Superior Court in which said suit is brought, to answer or plead to the complaint of plaintiffs therein until the 4th day of June, 1915.

### V.

Your petitioner files and offers herewith its bond, with good and sufficient surety, for its entering in

the District Court of the United States, Northern Division of the Southern District of California, within thirty days from the date of filing said petition for removal of said cause, a certified copy of the record in said suit, and for paying all costs that may be awarded by said District Court, if said Court shall hold that said suit was wrongfully or improperly removed thereto.

WHEREFORE, your petitioner prays this Honorable Court to accept said bond as good and sufficient, and to make its order for the removal of said cause to the District Court of the United [19] States for the Northern Division of the Southern District of California, pursuant to the Act of Congress in such cases made and provided, and for such other and further order as may be proper, and to cause the record herein to be removed to said District Court, and that no other or further proceedings be had in said Superior Court.

[Seal] SOUTHERN PACIFIC COMPANY.

By G. L. KING.

L. L. CORY,

Attorney for Petitioner.

State of California,  
City and County of San Francisco,—ss.

G. L. King, being duly sworn, deposes and says:

That he is an officer, to wit, assistant secretary, of Southern Pacific Company, petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that said petition is true of his own knowledge, except as to the matters therein stated



on information or belief, and as to such matters that he believes it to be true.

[Seal]

G. L. KING.

Subscribed and sworn to before me this 25th day of May, 1915.

[Seal]

E. B. RYAN,

Notary Public in and for the City and County of San Francisco, State of California. [20]

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*In the Superior Court of the County of Fresno, State of California.*

No. 18,238.

GERTRUDE WRIGHT, and ORENE WRIGHT,  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant.

Defendant.

**Bond for Removal.**

KNOW ALL MEN BY THESE PRESENTS:  
That Southern Pacific Company, a corporation duly incorporated and existing under laws of the State of Kentucky, and a resident of said State, as principal, and United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, which said corporation has complied with the laws of the State of California with reference to doing and transacting

business in said State of California, as surety, are held and firmly bound unto Gertrude Wright, and Orene Wright, and Ora Wright, by Gertrude Wright, their guardian *ad litem*, in the penal sum of one thousand dollars (\$1,000), for the payment whereof, well and truly to be made unto said Gertrude Wright, and Orene Wright, and Ora Wright, by Gertrude Wright, their guardian *ad litem*, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

SEALED with our seals and dated in the city and county of San Francisco, State of California, this 25th day of May, 1915.

WHEREAS said Southern Pacific Company has petitioned, [21] or is about to petition, the above-named Superior Court for the removal of the above-entitled cause of action therein pending, wherein said Gertrude Wright, and Orene Wright, and Ora Wright, by Gertrude Wright, their guardian *ad litem*, are plaintiffs, and said Southern Pacific Company is defendant, to the District Court of the United States for the Northern Division of the Southern District of California.

NOW, THE CONDITION of this obligation is such that, if the said defendant, Southern Pacific Company shall enter in said District Court of the United States in and for the Northern Division of the Southern District of California, within thirty days from the date of filing said petition for removal of said cause, a certified copy of the record in the above-entitled suit or action, and shall pay all costs that may be awarded by said District Court if said

District Court shall hold that said suit was wrongfully or improperly removed thereto, and shall appear and enter special bail in said suit if special bail was originally requisite therein, then the above obligation shall be void; otherwise, it shall remain in full force and effect.

WITNESS our hands and seals the day and year first above written.

SOUTHERN PACIFIC COMPANY,

[Seal]

By G. L. KING,

Assistant Secretary.

UNITED STATES FIDELITY AND  
GUARANTY COMPANY.

[Seal]

By W. S. ALEXANDER,

Attorney in Fact.

And PAUL J. LEVERING,

Attorney in Fact.

State of California,

City and County of San Francisco,—ss.

On this 25th day of May, 1915, before me, E. B. Ryan, a notary public in and for the city and county of San Francisco, [22] duly commissioned and sworn, personally appeared G. L. King, known to me as the assistant secretary of the Southern Pacific Company, the corporation described in and that executed the foregoing bond, and acknowledged to me that said corporation executed the said bond.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the city and county of San Francisco, State of Cali-



fornia, the day and year in this certificate first above written.

[Seal]

E. B. RYAN,

Notary Public in and for the City and County of San Francisco, State of California.

State of California,

City and County of San Francisco,—ss.

On this 25th day of May, 1915, before me, W. W. Healey, a notary public in and for the city and county of San Francisco, duly commissioned and sworn, personally appeared W. S. Alexander and Paul J. Levering, known to me to be the persons whose names are subscribed to the foregoing instrument as attorneys in fact for the United States Fidelity and Guaranty Company, and they acknowledged to me that they subscribed the name of the United States Fidelity and Guaranty Company thereto as attorney in fact.

[Seal]

W. W. HEALEY,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: 18,238. Filed Jun. 4, 1915. D. M. Barnwell, Clerk. By Louis F. Ryan, Deputy. [23]

*In the Superior Court of the County of Fresno, State  
of California.*

No. 18,238.

GERTRUDE WRIGHT, and ORENE WRIGHT,  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

**Order for Removal.**

Upon reading and filing the petition and bond of defendant Southern Pacific Company for removal of the above-entitled action to the United States District Court for the Northern Division of the Southern District of California, and it appearing to the Court that written notice of said petition and bond for removal was given by defendant to plaintiffs prior to filing said petition and bond, and this matter duly coming on for hearing, said bond is hereby approved and accepted as good and sufficient, and it is hereby ORDERED that said cause be, and the same is, hereby removed to the District Court of the United States for the Northern Division of the Southern District of California.

Dated this 4th day of June, 1915.

H. Z. AUSTIN,  
Judge.

[Endorsed]: 18,238. Filed Jun. 4, 1915. D. M. Barnwell, Clerk. By Louis F. Ryan, Deputy. [24]

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*In the Superior Court of the County of Fresno,  
State of California.*

No. 18,238.

GERTRUDE WRIGHT, and ORENE WRIGHT,  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *Ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

**Certificate of Clerk of State Court on Removal.**

I, D. M. Barnwell, County Clerk and ex-officio clerk of the Superior Court of the county of Fresno, State of California, hereby certify that I have compared the annexed and foregoing copies of complaint, demurrer, notice, petition and bond of defendant Southern Pacific Company, for removal of cause to the United States District Court for the Northern Division of the Southern District of California, and order for removal, in the case of Gertrude Wright, and Orene Wright and Ora Wright, by Gertrude Wright, their guardian *ad litem*, vs. Southern Pacific Company, and constituting the record in said cause, with the originals now on file in my office, and that such annexed and foregoing copies are true and correct transcripts thereof, and of the whole of said originals.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 4th day of June, 1915.

[Seal]

D. M. BARNWELL,  
Clerk.

(Documentary Stamp. 10¢.) [25]

[Endorsed]: No. 71—Civ. U. S. District Court, Southern District of California, Northern Division. Gertrude Wright et al., Plaintiffs, vs. Southern Pacific Company, Defendant. Transcript on Removal. Filed Jun. 8, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. \_\_\_\_\_, Attorney for \_\_\_\_\_, 828 Flood Building, San Francisco, California. [26]

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*In the District Court of the United States, Southern District of California, Northern Division.*

GERTRUDE WRIGHT, and ORENE WRIGHT,  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *Ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant.

**Answer.**

Now comes the defendant above named, and answering the Complaint of the plaintiff herein, alleges and denies as follows, to wit:

I.

That it has no information or belief with refer-

ence to any of the allegations contained in paragraph II of said Complaint, sufficient to enable it to answer the same, and basing its denials upon that ground, denies that the plaintiffs are, or either of them is, a minor, or that either of them is under the age of fourteen years, or that the plaintiff Gertrude Wright is the mother of said minors, or either of them, or that at the time of the beginning of this action, or at any other time, said Gertrude Wright made any application to be appointed the guardian *ad litem* of said minors, or either of them, for the purpose of prosecuting or conducting this action, or otherwise, or that any such alleged application was granted by any order of Court duly, or otherwise, given, made or entered, or that said Gertrude Wright has ever been appointed or is now the duly or otherwise qualified or acting guardian *ad litem* of the plaintiffs or either of them.

## II.

This defendant denies that at any time or place, while [27] George R. Wright was traveling upon any highway or attempting to cross any railroad track of this defendant, or at any time while he was passing on to or attempting to cross any railroad track of this defendant, it, through any of its agents or servants or otherwise, then or there acting within the scope of their or either of their employment, in any manner carelessly or negligently operated any locomotive of the defendant on any railroad so that any locomotive of this defendant ran into or upon or collided with any automobile truck in which said George R. Wright was then or there or at any time



riding, in consequence of which, or otherwise, said George R. Wright was then or there, or at any time, thrown violently, or otherwise, from any automobile truck, or that he was then or there, by reason of any fault or negligence whatsoever of this defendant, maimed or killed.

### III.

That this defendant has no information or belief with reference to any of the allegations contained in paragraph V of said Complaint sufficient to enable it to answer the same, and basing its denials upon that ground, denies that the plaintiffs are, or any one of them is, the heir at law, or that the plaintiffs are all of the heirs at law of said George R. Wright; or that the plaintiff Gertrude Wright is thirty-one years of age or is the surviving wife of said George R. Wright; or that the plaintiffs Orene Wright and Ora Wright are the children of said George R. Wright, or that the plaintiffs were, or either of them was, at the time of the death of said George R. Wright, dependent upon him for support and maintenance, or were, or are, entitled to support, maintenance society, comfort or protection at the hands of said George R. Wright, or would now be entitled to receive, or would receive from said George R. Wright, were he living, or otherwise, any support, maintenance, society, comfort or protection, or that [28] all of the plaintiffs have been, or any one of them has been, deprived, by the death of said George R. Wright, of any support, maintenance, society, comfort or protection, or that in his lifetime said George R. Wright was a hardworking, sturdy,

robust man, or was thirty-seven years of age at the time of his death, or that he was earning, or was capable of earning any sum in excess of \$50 per month in any business in which he was then engaged.

#### IV.

This defendant denies that on account of the death of said George R. Wright, caused by any carelessness or negligence whatsoever of this defendant, the plaintiffs have, or any one of them has, suffered damages in any sum whatsoever.

And this defendant, further answering said Complaint, alleges:

#### I.

That the alleged death of said George R. Wright was occasioned solely and alone because of the carelessness and want of care of said deceased and the person driving and in charge of said automobile truck. That neither said George R. Wright or the person driving and managing said automobile truck looked or listened for any approaching train before they attempted to cross the tracks of this defendant as alleged in said Complaint. That at the time said George R. Wright and the person in charge of said automobile truck approached said crossing and attempted to cross the track of the defendant, as alleged in said Complaint, the approaching train of the defendant which collided with the automobile in which said George R. Wright was then traveling, was in plain view and could have been seen in ample time to have avoided the accident resulting in the death of said George R. Wright. That neither said George R. Wright or the person driving [29]

and in charge of said automobile truck looked or listened for an approaching train before attempting to cross the track of the defendant at the time of the accident, and if either of said parties had looked or listened before attempting to cross said track, they and each of them would have seen the approaching locomotive and train of the defendant in ample time to have stopped and prevented the accident.

WHEREFORE, defendant prays that plaintiffs take nothing by their action, and that the defendant have judgment for its costs of suit.

L. L. CORY,

Attorney for Defendant.

State of California,  
County of Fresno,—ss.

L. L. Cory, being first duly sworn, deposes and says: That he is the attorney for the defendant corporation above named; that he has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and that as to those matters that he believes it to be true; that the reason why this verification is made by affiant, and not by one of the officers or representatives of the defendant, is that the facts are within the personal knowledge of affiant and that no one of the officers or representatives of the defendant resides or has his place of business in the county of Fresno where affiant resides and has his place of business.

L. L. CORY.



Subscribed and sworn to before me this 4th day of December, 1915.

[Seal] ELEANOR OWEN,  
Notary Public in and for the County of Fresno,  
State of California. [30]

[Endorsed]: 71—Civil. In the District Court of the United States, Southern District of California, Northern Division. Gertrude Wright, and Orene and Ora Wright by Gertrude Wright, Their Guardian *ad Litem*, Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. Answer. Due service of the within Answer admitted by copy this 7th day of December, 1915. Frank Kauke, Gallaher & Aten, Attorneys for Plaintiffs. Filed Dec. 8, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. L. L. Cory, Attorney at Law, First National Bank Building, Fresno, Cal., Attorney for Defendant. [31]

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*In the District Court of the United States, in and for the Southern District of California, Northern Division.*

No. 71—CIVIL.

GERTRUDE WRIGHT and ORENE WRIGHT,  
by GERTRUDE WRIGHT, Their Guardian  
*ad Litem*,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant.

**Verdict.**

We, the jury in the above-entitled cause, find in favor of the plaintiffs, and assess as damages against said defendant the sum of twelve thousand and no/100 dollars (\$12,000).

Dated Fresno, Cal., May 5, 1916.

H. M. McLENNAN,  
Foreman.

[Endorsed]: 71—Civil. U. S. Dist. Court, So. Dist. Cal., No. Div. Gertrude Wright et al. vs. Southern Pacific Co. Verdict. Filed May 5, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [32]

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UNITED STATES OF AMERICA.

*District Court of the United States, Southern District of California, Northern Division.*

No. 71—CIVIL.

GERTRUDE WRIGHT and ORENE WRIGHT,  
by GERTRUDE WRIGHT, Their Guardian  
*ad Litem*,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant.

Defendant.

**Judgment.**

This cause coming on regularly to be tried before the Court and a jury to be duly impaneled, on

Wednesday, the 3d day of May, 1916, being a day in the May term, A. D. 1916, of said District Court of the United States of America, in and for the Southern District of California, Northern Division; M. G. Gallaher, Esq., Ralph Aten, Esq., and Frank Kauke, Esq., appearing as counsel for plaintiffs; L. L. Cory, Esq., appearing as counsel for defendant; and a jury of twelve (12) men having been duly impaneled, and the trial having been proceeded with on said 3d day of May, 1916, and on the following 4th and 5th days of May, 1916, and testimony having been presented on behalf of the plaintiff, and defendant having moved for a nonsuit, which motion is overruled by the Court, and the defendant having thereupon rested without offering any evidence herein; and the cause having been argued to the jury by counsel for the respective parties, and having been submitted to the jury, under the instructions of the Court, and the jury having thereupon, on said 5th day of May, [33] 1916, rendered the following verdict, viz.: "In the District Court of the United States, in and for the Southern District of California, Northern Division. Gertrude Wright and Orene Wright, by Gertrude Wright, their guardian *ad litem*, Plaintiffs, vs. Southern Pacific Company, a corporation, Defendant. No. 71—Civil. Verdict. We, the jury in the above-entitled cause, find in favor of the plaintiffs, and assess as damages against said defendant the sum of twelve thousand and no/100 dollars (\$12,000).

Dated Fresno, Cal., May 5th, 1916.

H. M. McLENNAN,  
Foreman."

—and the Court having ordered that judgment be entered herein in accordance with the verdict of the jury;

NOW, THEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is considered by the Court that Gertrude Wright and Orene Wright, by Gertrude Wright, their guardian *ad litem*, plaintiffs herein, do have and recover of and from the Southern Pacific Company, a corporation, defendant herein, the sum of twelve thousand dollars (\$12,000), together with their, said plaintiff's costs, in that behalf taxed at \$58.50.

Judgment entered May 8, 1916.

WM. M. VAN DYKE,  
Clerk.

By Leslie S. Colyer,  
Deputy Clerk.

[Endorsed]: No. 71—Civil. United States District Court, Southern District of California, Northern Division. Gertrude Wright and Orene Wright, Their Guardian *ad Litem*, Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. Copy of Judgment. Filed May 9, 1916. Wm. M. Van Dyke, Clerk. By T. F. Green, Deputy. [34]

*In the District Court of the United States, in and  
for the Southern District of California, North-  
ern Division.*

No. 71—CIVIL.

GERTRUDE WRIGHT, and ORENE WRIGHT  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

**Certificate of Clerk to Judgment-roll.**

I, Wm. M. Van Dyke, Clerk of the District Court  
of the United States of America, in and for the  
Southern District of California, do hereby certify  
the foregoing to be a true copy of the Judgment  
entered in the above-entitled action, and recorded  
in Judgment-book No. 1, at page 114 thereof, for  
the Northern Division; and I do further certify that  
the papers hereto annexed constitute the Judgment-  
roll in said action.

ATTEST my hand and the seal of said District  
Court, this 9th day of May, A. D. 1916.

[Seal]

WM. M. VAN DYKE,

Clerk.

By T. F. Green,

Deputy Clerk.

[Endorsed]: No. 71—Civil. In the District Court of the United States for the Southern District of California, Northern Division. Gertrude Wright et al. etc. vs. Southern Pacific Company, a Corp. Judgment-roll. Filed May 9, 1916. Wm. M. Van Dyke, Clerk. By T. F. Green, Deputy Clerk. Recorded Judgment-book No. 1, page 114. [35]

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*In the District Court of the United States Southern  
District of California, Northern Division.*

GERTRUDE WRIGHT and ORENE WRIGHT and  
ORA WRIGHT, by GERTRUDE WRIGHT,  
their Guardian *ad Litem*,

Plaintiffs,

v.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant.

### **Bill of Exceptions.**

BE IT REMEMBERED, that on the 3d day of May, 1916, this action came on regularly to be tried before this Court, with a jury, Messrs. Gallaher & Aten and Frank Kauke appearing as attorneys for the plaintiffs, and L. L. Cory, Esq., appearing as attorney for defendant, at which time the following proceedings were had and evidence taken, to wit:

### **Testimony of Fred Tucker, for Plaintiffs.**

FRED TUCKER, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. KAUKÉ.)

My name is Fred Tucker. I reside at Selma. I



(Testimony of Fred Tucker.)

have resided there about three years. My age is thirty-seven. I am in the automobile business and was in that business in May, 1914, the same as now, handling and selling automobiles, having a place of business in Selma for that purpose. I have been handling and operating automobiles and automobile trucks for about four years. During that time, as a driver or what is called a chauffeur, I have been familiar with the operating of machines and trucks, [36] automobiles. On May 22d, 1914, I was one of the parties that were in the collision on the Southern Pacific Railroad crossing at Selma. It was a 3½ ton Kelly truck that was being used (T. p. 3). It had been used very little and was obtained from J. C. Phelan. I had full charge of the operating of the truck. Prior to the time of the accident that morning we had hauled one load of raisins to Del Rey and on the return trip had filled up with distillate at the Standard Oil Company's filling station. We had a flat rack, made of 2-inch lumber, on the truck for hauling raisins. Mr. Wright had been riding with me on this truck during that morning up to the time of the accident. I was driving as we were coming down from the Standard Oil Tanks to the place of the accident (T. p. 4).

#### EXCEPTION NO. 1.

Mr. KAUKU.—Q. Did Mr. Wright have anything to do with the operating of the machine?

Mr. CORY.—Objected to as irrelevant, incompetent and immaterial, not tending to prove any issue in the case.

(Testimony of Fred Tucker.)

The COURT.—The objection is overruled.

(Question read.)

A. None whatever.

#### EXCEPTION NO. 2.

Mr. KAUKKE.—Q. Did he assume, in other words, did he give you any directions or instructions or say anything to you as to how it should be operated, at all? A. No, sir.

Mr. CORY.—Objected to as irrelevant, incompetent and immaterial, calling for hearsay testimony.

The COURT.—The objection is overruled.

Mr. KAUKKE.—Your answer? A. No, sir.

WITNESS.—(Continuing.) I do not know just what they call this street where this accident occurred; it is a junction of Arrant's street I think. This extension of Arrant Street goes across the Southern Pacific tracks at right angles, squarely across [37] (T. p. 5 and 6). There is a street or roadway westerly of the railroad running northwest and southeast, commonly called West Front Street, and there is a roadway easterly of the railroad track running northwest and southeast called East Front Street. There are two switching tracks or side tracks between East Front Street and the main line of the railroad where the regular trains come in. As near as my measurements or estimates can furnish you, it is about 60 feet from the main line of the railroad to the roadway on East Front Street, measuring at right angles. I know the location of the Standard Oil Company's tanks, or oil business up the



(Testimony of Fred Tucker.)

track towards the northwest, on the east side of the track. I have measured that by stepping or otherwise, so that I know approximately the distance from this crossing on Arrant Street where the accident occurred, to the Standard Oil Company tanks; it is about 1400 feet (T. p. 6). The next crossing north across the Southern Pacific tracks, after Arrant Street, is beyond the oil works, the county road, I suppose. I do not know the name of it. It crosses the track at right angles, or practically so, might be a little at another angle. The road comes down north and south and makes a little turn. In any event, there is a crossing north of the oil tank. It is three city blocks from the crossing where the accident occurred to the passenger depot in Selma. When we were at the oil tanks we filled the car with distillate there. After leaving the oil tanks that morning we came southeast, parallel with the railroad; that would be on East Front Street (T. p. 7). It was immediately prior to the accident, or collision, that we were coming down that street. On that trip down, at about 145 feet, in a circle, where we would start to make the turn across the track, I looked for the trains which might be coming from the northwest and going southeast. In other words, I would have to travel about 145 feet from that point of observation to the crossing of the main line. That point where we were, if instead of going around [38] from that point you measured straight across, would be about 60 ft. from the main line. What I have already stated was the distance from the main

(Testimony of Fred Tucker.) •

line, at right angles. At that point, with reference to looking for trains, I looked at the track, as far as I could see in making the angle—would be about the oil station or probably a little further, looking up the track as I made the circle. I would have to make a circle to cross the track. I looked up the track and could see with a clear vision to the oil tanks, or a little further at the point I looked (T. p. 8).

At this point the blue-print hereinafter referred to was presented by Mr. Cory (T. p. 9).

WITNESS.—(Continuing.) I have located the place in the road, as near as it is possible to locate it, where we were when I looked for the train to the northwest. When I looked there I listened for trains. My eyesight is perfect and my hearing is good. At that time I saw the railroad track from the crossing to pass, northwesterly, a point beyond the oil tanks. I did not see any train there, none in sight. I had not, prior to that time, or at that time, heard any warning sound, in the way of a bell, whistle or otherwise, of a train (T. p. 10-11).

Mr. GALLAHER.—If your Honor please, a witness who is here only to identify a book, is in bad health, and the doctor tells him to get back home, and we would like to withdraw this witness just long enough to identify the book.

The COURT.—All right.

**Testimony of O. E. Dillon for Plaintiffs.**

O. E. DILLON, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. GALLAHER.)

My name is O. E. Dillon. I live at Selma. I am city clerk at Selma, and as such have the custody of the books and records of the city. The book you have handed me, marked "Ordinances," is the ordinance record book of the city of Selma, and contains [39] the record of ordinances passed by the board of city trustees. I do not recall the page of the ordinance book the ordinance is on. I didn't look the matter up at all this morning. I just simply saw that the number was probably in there.

EXCEPTION NO. 3.

Mr. GALLAHER.—I have it. We desire to introduce in evidence, so that this book may not be retained here, Section 17 of Ordinance No. 51 of the city of Selma, commonly known and entitled as the misdemeanor ordinance of the city of Selma. We offer Section 17.

Mr. CORY.—We object to that as irrelevant, incompetent and immaterial, if the Court please, not shown to have been adopted in any manner at any meeting of said city trustees, or published as required by law, or duly authenticated in any way.

Mr. GALLAHER.—The statute providing for the keeping of an ordinance book in the State of California provides it shall be *prima facie* evidence as to

(Testimony of O. E. Dillon.)

the existence, force and effect of the ordinance as therein set forth.

The COURT.—The objection is overruled.

Mr. CORY.—We except.

Mr. GALLAHER.—We desire to read into evidence, so that the book may be returned, Section 17, appearing at page 197 of the Book of Ordinances.

Mr. KAUKÉ.—Mr. Cory, do you want the whole ordinance read? Do you desire the whole ordinance read?

Mr. CORY.—No, I don't care anything about it.

Mr. GALLAHER.—(Reading:) "Section 17. Any person who shall run or propel any railroad car, locomotive, hand-car, horse car or any train of cars in this town at a greater rate of speed than eight miles per hour, or in such manner as to endanger or obstruct the free passage of any public street, is guilty of a misdemeanor." [40]

Mr. GALLAHER.—(Continuing.) The certificate is: Passed at a regular session of the board of trustees of the town of Selma held this 26th day of December 1896—giving the vote, and certified by the clerk. That is all.

**Testimony of Fred Tucker, for Plaintiffs (Recalled).**

FRED TUCKER, being recalled for further examination, testified as follows:

Direct Examination.

(By Mr. KAUKÉ.)

After locating that point as near as it is possible to do, I then measured it more or less accurately to

(Testimony of Fred Tucker.)

ascertain how far that point was from the middle of the main track where this accident occurred (T. p. 13). That was about 145 feet. From that point on to where the accident occurred, with reference to looking or listening or observing the railroad track for trains, the first thing I did was to look clear up the track, that it was clear in this direction. I got a good clear vision as far as the oil station or a little further, which satisfied me absolutely that there was no train coming. Then, being that Castle Bros. packing-house on the left hid the view both on the platform and side tracks there, which are always as much allowed for as the main tracks, in case of switching, I directed my view that way until I got clear out beyond until I knew everything was safe the way my view was ahead (T. p. 13-14). I looked to the left, which would be southeasterly, down towards the depot and Castle Bros. packing-house to see whether anything was coming northwesterly. Then after I was through looking that way I turned and looked the other way. When I turned my gaze from the southeasterly and looked back the other way I had reached the point where the truck was practically going on to the main line track, as near as I can remember, when I saw the train coming, the front end of the train; pratically, the front part of the truck was on the main line (T..p. 14). I could only [41] see the train coming and didn't hear any whistle or bell. When I saw the train it appeared to be coming very fast, it seemed to be 200, 300 or 400 ft. away, but it is hard to tell, possibly say



(Testimony of Fred Tucker.)

400 ft. It was coming from the northwest. I then reached down and opened the throttle and tried to gain a little more speed—I was going very slow—and my automobile went forward. I watched this way until the train struck. That is the last I knew. I was rendered unconscious by this collision. I should judge it was the afternoon of the same day when I regained consciousness. So far as I observed the time, the collision was at 9 o'clock in the morning. I didn't see or hear anything as to any brake being applied. I didn't hear the bell or whistle (T. p. 15-16).

#### EXCEPTION NO. 4.

Mr. KAUCHE.—Q. This man, Mr. Wright, that was with you, if you know from knowledge you then had, or since obtained, what was his age, or about what at that time?

Mr. CORY.—I object to that as calling for the opinion of the witness. I suppose there are better ways of proving that, if the Court please.

The COURT.—Objection overruled.

Q. I would judge Mr. Wright to be about 30 years old. I don't know what his age was.

Mr. CORY.—I move that the answer be stricken out, if the Court please.

The COURT.—Overruled.

WITNESS.—(Continuing.) Up to that time I had known Mr. Wright about two years. I should judge he would weigh 185 or 190 lbs. He seemed to be a strong man, perfectly healthy, from my ac-



(Testimony of Fred Tucker.)

quaintance with him (T. p. 17). I believe with reference to observing the train, that Mr. Wright looked up the track at the same time I did, when we first made the circle. After that I didn't observe because I was looking away from him. Nothing was done by him that I saw, or said by him to me, with reference to the train coming down. I can see the blue-print on the board from here.

Mr. KAUCHE.—Q. Now, this is marked on here "Standard Oil Company" and here is a rectangular space there. Do you know what that represents, Mr. Tucker?

A. That I think, is a structure of some kind alongside of the railroad reservation. In coming down from the Standard Oil Company's [42] tanks there is a road that winds about until it gets down further south; that is the road we came, and then we came on down East Front St. This map here shows Arrant St. running diagonally and then goes at right angles across the track (T. p. 18). That is the street where the accident occurred, and that is the main line there, where you have your finger, or thereabouts, on the map. When I looked up the track to see whether the coast was clear I should judge I was about here (indicating on blue-print), about half an inch northeasterly of the cross on the map, near the turn. This to the west, I mean on the west side, running parallel with the track, is what I referred to heretofore as West Front St., and it is so marked on the map. That crossing which, if this track runs northwesterly, must apparently be run-

(Testimony of Fred Tucker.)

ning north and south, is the crossing I referred to as being the crossing north of the Standard Oil Company, and then beyond that, further northwesterly, is what I referred to as the cemetery. Right here at the southeasterly part of that extension of Arrant St. is a rectangular space marked here "Castle Bros. packing-house." That is the packing-house I referred to (T. p. 19-20), the one where I looked to the southeast to notice the trains coming up from the south that pass that packing-house. The main line being here, this next space is what you call a side-track of some kind, and then east of that is another one, being two tracks east of the main line, and that we had to cross before we got to the main line where the accident occurred.

Cross-examination.

(By Mr. CORY.)

I have lived in Selma about four years. I lived there for about two years before the accident and during that period of time I had been in the automobile business. The day on which the accident occurred was a bright May day so far as I remember and no wind blowing. There was no unusual noise to distract my attention at the time we made this crossing. I had gone with Mr. Wright to the Standard Oil Station for the purpose of filling the truck with distillate, shortly before 9 o'clock that morning, and when we had filled it, we started back to Selma again along this road known as East Front road. The truck was a left-hand drive. As we proceeded down that road towards Selma I was driving the

(Testimony of Fred Tucker.)

truck. I was on the east side of the track [43] in other words, the side of the track furthest away from the railroad. Mr. Wright was seated with me on the right side. There was one seat to the truck and he was with me on it on the side nearest the railroad (T. p. 21). In a way I was fulfilling two things, demonstrating the truck to Mr. Wright and also doing some work for him. He was paying for the use of the truck, renting it. I was driving the truck for Mr. Phelan; I had charge of it, was the driver to go with it, and Mr. Wright was paying the rental for it. It had been in use one day before that. He had rented it for the previous day and that day (T. p. 22). I should judge we were going about 6 miles an hour while we were coming down the highway, and while we were coming down the road, about 6 miles an hour, until I got to the corner. The truck was empty. I was not talking to Mr. Wright and he was not saying a word, not from the time we were at least half way down from the oil station to that point, up to the time of the accident. Nothing was said that I know of. All that time we were going about 6 miles an hour until I came to the turn, then I slowed down to about, I should judge, from three to four miles an hour. There is a circular turn there (T. p. 23). As near as I can figure out, when I started to make the turn I looked first towards the oil tanks to see that there was no train coming. I looked up the track and did not see any train coming and from that time proceeded on my way, and never looked in the same way again to see if there was a

(Testimony of Fred Tucker.)

train approaching until I passed a clear vision of the packing-house. I was practically on the main track and looked and saw the train coming right on us. For the 145 feet that I testified to, during that entire time while we were traversing that 145 feet, practically, I never looked again towards the oil tanks or the northwest to see if the train was approaching. The view was not obstructed in any way (T. p. 24). There were only 8 or 10 poles zigzagging along through there, I don't know just how many there were. The only thing there was [44] to obstruct our vision, if it can be an obstruction, were some telegraph poles. The whole space there was unobstructed and there was no reason why, if I had looked, I couldn't have seen the train approaching. I am sure Mr. Wright's eyesight was good. It was good as far as I know, and his hearing was good. I would have no way of knowing that his eyesight was good and his hearing good, except that I was sure it was. Before we reached the main track at that crossing on that day we crossed two other tracks on the railroad. The main track was the third track (T. p. 25). I measured that distance as near as I could; I stepped it. I have been there several times since the accident. I made the measurements for the purpose of locating the point within the last week. No one requested me to do that. The first time I went there for the purpose of locating that point and making the measurements was some time after I got well, within the same year, possibly. I went alone. To



(Testimony of Fred Tucker.)

determine this point where I think it was that I first looked up the track to see whether a train was approaching, I took a truck and drove it over the ground at as near as I could the same speed and the same way that I drove it that day (T. p. 26). I drove the truck over there for the purpose of making an estimate, as near exactly the same as I could. I have no way exactly of definitely locating that point where I say I looked, but the best of my recollection and the best information I have at the present time, it was about 145 feet. Then I measured the point, stepped it off. I also stepped the distance between the crossing and the oil tanks; as near as I could I stepped it in my own way of stepping, and as accurately as I could. I made the distance to where my vision would reach at that time about 1400 feet, I should judge, the way I stepped it. As I came nearer the center line of the track, the main line where the accident occurred, I could see further and further up the main track, so before I reached the main track there was nothing to obscure my vision for miles up the main track except the poles, that I [45] remember. The nearer I approached the main track the further up the main track I could see (T. p. 27.) From the point where I was, the only obstruction would be the oil tanks, except these poles that I mentioned. When I first saw the train I think the front wheels of the truck were just about on the main track, and then my only thought was to put on speed and see if I could get across in front of it.

(Testimony of Fred Tucker.)

Q. And of course, how far that was from you, bearing down upon you, or how fast it was going, you had no means of knowing?

A. I am pretty sure it was from three to four hundred feet.

WITNESS.—(Continuing.) The only means of knowing is to go over the ground again and look where I saw the train. I had no way of knowing how fast it was coming right towards me. The minute I saw the train I speeded up the machine and it responded quickly. The train struck the rear wheel of the machine. A few inches more and we would have cleared the track (T. p. 28).

Redirect Examination.

(By Mr. KAUCHE.)

Going over the route with the truck since the accident was for the purpose of locating the point and the rate of speed. I know where I saw the train; I could take the truck and go over it again and see, and then I have stepped the ground, to locate how far I could see by turning there. Referring to this map, I think I could see possibly halfway between what is marked here the "Standard tank" and the road. The rate of speed I think we were going from the turn there or from the time I looked to the time I got to the main track was some 3 or 4 miles an hour. I have ascertained that by going over it as near as I could in the same way since then and timing it. In regard to the arrangements made with reference to the use of this truck, I did the talking over the phone (T. p. 29-30). [46]



(Testimony of Fred Tucker.)

EXCEPTION NO. 5.

Mr. KAUKÉ.—Q. Now, what was said and done between you and the owner of the truck and the man that let it be used as to what you were to do with reference to it?

Mr. CORY.—We object to that as irrelevant, incompetent and immaterial and calling for hearsay.

The COURT.—Overruled.

A. The conversation over the phone?

Q. Yes.

A. Mr. Phelan said he would rent Mr. Wright the truck for \$15 a day providing I would drive it, but he would not rent it to him, let him drive it, because he didn't know him, and didn't know whether he knew how to drive it or not, and he knew that I knew how to drive it. He said that. I was working for him. I had worked for Mr. Phelan before then. Mr. Phelan only said it was all right over the phone providing I would drive it (T. p. 30). I had no arrangement with Mr. Wright about employing me. He was to get the truck for \$15 a day. With reference to the oil tanks or road and the city limits, I could show you on the map; about here, some place right in close here (indicating on blueprint), north of the tanks and south of the crossing are the city limits (T. p. 31-32).

Recross-examination.

(By Mr. CORY.)

I called the truck a 3½ ton truck. I mean the carrying capacity; I don't know the weight of the truck. The maximum speed of the truck, when

(Testimony of Oscar Thurman Hess.)

empty, is 12 miles an hour. It would not make 12 miles an hour loaded (T. p. 32). [47]

**Testimony of Oscar Thurman Hess, for Plaintiffs.**

OSCAR THURMAN HESS, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. KAUCHE.)

I reside at 2325 West Front Street, in Selma, California. I am a letter-carrier at Selma (T. p. 32). My age is 27. I am familiar with the various streets and places in the city of Selma on the west side. I was performing my duties as letter-carrier on the morning of the 22d day of May, 1914. I saw the accident in which George R. Wright was killed that morning. At the time of the accident I was almost due south of where it occurred, a little bit to the west. Referring to this map, coming from Fresno and going southeasterly, here is West Front Street, and coming from the oil tanks down this way is East Front Street, and we come to a street that runs diagonally,—Arrant Street, and this is an extension of Arrant Street coming at right angles across the railroad. I was on the sidewalk on West Front Street,—south, towards the main part of town. At that time my judgment was that I was about 200 feet from the main track where this collision occurred. Since, I find it was about 25 feet more, about 75 yards. I was that far away from the collision at the time it occurred. The accident was between 8:45 and 8:50 that morning. I saw the

(Testimony of Oscar Thurman Hess.)

train coming from the northwest to the southeast that morning (T. p. 34), I cannot state the exact place where the train was when I first caught sight of it, but of course it was north of this crossing I noticed the train. When I took particular notice it was between the oil tanks and the crossing, pretty well towards the oil tanks. My hearing and my sight are good. I can say that after I noticed the train there was no whistle, but as far as the bell ringing is concerned, I can't swear positively. I can't say that I heard any bell. I did not hear any bell when the train stopped, or whistle after the train stopped. I can't say whether the bell was ringing after the accident because I was too much interested in taking [48] care of the fellows that were hurt (T. p. 35). I went over there as quick as possible and I did what I could. Before I had time to go there after the engine got across this crossing I did not hear any whistle or ringing of a bell. Before the collision that morning I only noticed the truck coming down the road on the east side of the track. I never noticed any blowing of the whistle during all that time, in that distance or anywhere. I saw the truck do nothing unusual, just coming down that road to make that crossing; I found afterwards that it was to make the crossing, but before it turned in to make the crossing there was nothing more than any other truck would do in coming down that road, just coming ordinarily along. I saw the truck when it made the turn in the road to get to the railroad, coming directly across the track. I don't know ex-

(Testimony of Oscar Thurman Hess.)

actly where the engine was then, but at that time I was paying attention to both, because when that truck made the turn there they were getting close enough to be within danger if one or the other of them didn't stop (T. p. 36). I think the engine was below the oil tanks, that is, between the oil tanks and the crossing.

#### EXCEPTION NO. 6.

Mr. KAUKÉ.—Q. What rate of speed, as near as you could estimate from your observation of the speed of the trains and automobiles was the train going when you first saw it?

Mr. CORY.—Objected to as irrelevant, incompetent and immaterial and the witness not shown to be competent.

The COURT.—Overruled.

The WITNESS.—Shall I answer?

The COURT.—Yes.

A. 30 miles.

WITNESS.—(Continuing.) I noticed that the train was not making much noise, that the steam, as I understand it, was cut off, and it was not puffing like it does when it is pulling. You see there is considerable difference between the noise of an engine [49] when it is pulling and when it is not pulling, and I could state when I first noticed it the steam was shut off and the train was not making a great deal of noise. I said it was going at the rate of 30 miles an hour. I never noticed anything in particular with reference to the speed decreasing from then on to the collision; it would decrease some, but

(Testimony of Oscar Thurman Hess.)

at what rate I don't know (T. p. 37). I don't know whether it is down grade from the north to the south. I would say this truck was 100 feet from the main track, as near as I can estimate the distance, at the time I saw the engine somewhere this side of the oil tanks. The wind was blowing some that morning; I don't remember that it was any unusually strong wind. After I got to the place of the accident I saw that Mr. Wright was killed instantly and that Mr. Tucker was quite badly injured, but how bad I can't say, but they were both lying close to the track, on the ground. Mr. Wright was about 20 feet from where it struck the truck, southeast, and Mr. Tucker was something like 50 feet, I don't know the exact measurements, but he was at least twice as far as Mr. Wright was. The truck was thrown a little bit more than half way around. There is the main line there and then there is a side track over there and it was thrown across that side track and facing—it was coming this way when it was struck and after the accident it was setting facing this way and a little bit that way, about in that direction, going across this side track (T. p. 38). The engine struck the hind wheel, I don't know whether in the center or within the circle of the hind wheel, and that wheel was badly broken up, and as far as other damage, the seat was thrown off and also the gasoline can, which lay near Mr. Tucker's head. I didn't notice the pilot or cowcatcher on the engine because it was down beyond the accident and I didn't go down there. The best I remember there were seven



(Testimony of Oscar Thurman Hess.)

coaches on that train. The train came to a standstill where the last coach stayed on the crossing and blocked it. I do not [50] know the length of the coaches. The engine was about five or six hundred feet from the crossing. I did not hear anything in the way of any grinding noise, of brakes, or anything different than the ordinary movement of the wheels, until the collision. At the time I saw the train, and also the truck some hundred feet distant from the main track, I could hear the roaring or rumbling of the train, the wheels or whatever might make a noise. I also heard the truck. I have no knowledge of hearing any bell or whistle. The slacking of the speed of the train was nothing more than it would be with the steam all shut off and just "lagging" in, just natural gravitation, without the engine pulling. I noticed no sudden slacking of speed. I was watching it (T. p. 39-40).

Cross-examination.

(By Mr. CORY.)

About that time I saw there was probably going to be an accident and was very much interested. I don't know as I was excited but I was watching it very closely. I never saw an accident of that kind before, or since. I was not excited, that is something I very seldom get. I was very much interested, but as far as being excited, a man may get excited so that he don't understand what is going on, and that is what I would have you understand, that I was not excited to that extent. I was watching the movements of both very closely, one as much



(Testimony of Oscar Thurman Hess.)

as the other, the best I could. I knew Mr. Tucker and Mr. Wright at that time. As the truck was approaching the crossing they were facing me as they started to turn. I did not recognize them there. I knew the truck; I couldn't see the men well enough to tell just who. I knew Mr. Tucker was demonstrating that truck in Selma and I didn't know who was with him until I got over there. I watched the men in the truck. The only movement I could say positively that the men made was to raise just as the accident happened, both of them. While they were going that hundred feet I think the distance was [51] a little bit too far for me to say they were trying to stop or go ahead, or to look either way. I can't say I saw them make any movement at all until just before they got on the track, just before they were struck (T. p. 42). I was watching generally the movements, what was going on, just as much as I could. The first movement made, that I saw, on the part of either of the men, was just as it struck. They both raised up, both stood up, that way until it was done. I heard no whistle; I can't positively say the bell was not ringing; I do not remember. I don't remember being asked, before the inquest was held down there, whether the bell was ringing; I was asked at that time. I don't remember how long afterwards the inquest was held. The train was coming down on the right-hand side of these men, and Mr. Wright would be nearer the train (T. p. 43). I can't say which side of the truck they went out of, it was so quick I don't know, and

(Testimony of Oscar Thurman Hess.)

after it struck I couldn't tell which way they went, it was done instantly and I couldn't see. When they were a hundred feet or more from the crossing I saw the train south of the oil tanks. There was nothing at that time to obstruct the view of either Mr. Wright or Mr. Tucker of the approaching train between where the truck was and the train. I think the train must have been at least 300 yards, when I first saw it, as the truck began to turn in to the crossing. I testified at the coroner's jury. Since that time I have went over the ground; at that time I had not, therefore my testimony at that time would not be as correct as it should be now. I do not remember that I testified to 150 yards at the time of the inquest. When I first saw the train it was farther away than when I realized there was to be an accident. When I first realized there was going to be an accident the train was I would say a couple of hundred yards away, 600 feet, and the truck was then about one hundred feet away, so the truck went a hundred feet and the train went two hundred yards (T. p. 45). [52] I knew from the fact that the main track is not far from the side track, and there are two spurs on that side of the main line and a hundred feet is not a great ways from the first one, and they were still coming on, and as I couldn't notice any slackening of their speed, thinks I, "My goodness, are they going to come on?" I expected them to stop at any time. At this time the train was in plain view, and it had been in plain view ever since it had passed the oil tanks up there, if they

(Testimony of Oscar Thurman Hess.)

had wanted to look; the view is plain to the oil tank. They were on the road when I first saw them. I saw them before I saw the train. I saw them turn. It was after they had started to make the turn that I thought there was going to be an accident. I estimate the train was going about 30 miles an hour. That estimate is, to the best of my judgment, as to speeds. I have been over the ground since this happened (T. p. 46). I can say, from seeing trains run and paying attention to the speed of machines running, and for that reason, to the best of my knowledge that is as near as I can say as to the speed of that train. I have run a machine; I do not own one. I never ran a train. I have looked at speedometers to ascertain the speed which I was making. I never tried to race a train. I have tried to estimate the speed of trains, that is, since this time I have, and have taken a considerable interest in it. I was satisfied all this time I would be called on this and I wanted to get as near as possible so that I could say definitely about some things. I don't pretend to say positively that it was going 30 miles an hour, because I didn't time the train that morning. I did not know the speed of the truck either, any more so than I knew the speed of the train (47). In my opinion the truck was going 5 or 6 miles an hour. That is slow. The best I can learn, they run up to 15 miles; 15 miles is fast for a truck of that size. There is no grade to speak of there, it is practically on a level. The tracks are practically on the level from the oil tanks; and [53] the grade crossing

(Testimony of Oscar Thurman Hess.)

is level with the track, and the tracks level with the road. It was a nice pleasant May morning. I heard the train coming from the time I first saw it. I was familiar with the time that train reaches Selma. I do not know how long that train has been running on that time (T. p. 48). My business calls me in that neighborhood every morning about the time that train comes along, and if I was on schedule time I generally passed along there some place in that block when the train passed along there for, I will say, along six months. The train was on time practically that morning. It came in just as it usually came in.

On redirect examination, this witness testified as follows:

It usually comes in at the rate of speed I have testified to (T. p. 49). When I first thought there might be danger of a collision, the truck had almost completed the turn but was not facing directly across the track at that time. The turn does not turn square, it swings a little bit; it was on that turn that I noticed it (T. p. 50-51). The truck had not started to make the turn to the right when I noticed it. I saw it before it started to make the turn. I don't think I noticed the train before the truck started to make the turn to the right. That turn to the right is about 125 or 130 feet from where the collision occurred. I could show you on the map about that turn. When I first noticed the train and the truck, the train would be here some place, and the truck along here, just starting to make that turn.

(Testimony of Oscar Thurman Hess.)

There is where I said it was 125 or 130 feet from this place here, and that would be making a long sweeping turn in there. From where it started to make the turn it would have 125 feet to travel before it reached the center of the track (T. p. 51-52).

Recross-examination.

(By Mr. KAUCHE.)

They would not have to cross the track at that crossing to get into Selma, they could make a swerve to the left, and could still stay on the east of the track and go into Selma that way. [54] There is a road along that way. They would have to go round 'Castle Bros.' packing-house. The Selma Fruit Company packing-house is on the west, crossing here, about four blocks on the west side of town, on the street that crosses by the depot (T. p. 52). There are several ways they might have taken in order to get to Selma.

### **Testimony of John Bridges, for Plaintiff.**

JOHN BRIDGES, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. KAUCHE.)

I reside on Whitson Street in the north end of the city of Selma, a little south of the Standard oil tanks; it is on the west side of the railroad, just about a block from the railroad, on the street across the highway (T. p. 53). I am 35. I was at my home at the time the accident occurred on May 22d, 1914, down there in Selma. I was on the scaffold, paint-



(Tesimony of John Bridges.)

ing the window casing of my own home, if I remember. I had a full view of the railroad, both up and down. I know of this accident occurring on that morning. It was about nine o'clock. I was almost half way between where the accident happened and the oil station, on the west side. I saw this train that had the collision that morning when it came in (T. p. 54). When I first saw it, it was up at the oil station, just above the oil station, right close to the city limits crossing. I saw it from then on down to the place of the accident. I didn't notice the bell ringing. I didn't hear it ringing. The whistle blew at the city limits, at the crossing, right there by the graveyard, that is, the road that runs north and south across the railroad. The whistle was blown for that crossing I should judge something like a hundred yards north of that road, as near as I can fix it, a hundred yards before they got to the crossing. I didn't hear the whistle blow any more. I would judge that about 30 miles an hour was the speed of the train [55] that morning after it got into the city limits, after it came along where I was and further (T. p. 55). What drew my attention was the truck; it was on the opposite side of the track and it was going the same way that the train was and of course when it got down to the crossing to come across there was not any alarm given by the train at all, the train never whistled or anything until it hit the truck. When it hit the truck that gave quite a bit of racket. The truck was just thrown, turned about three circles, it looked like



(Tesimony of John Bridges.)

to me, before it hit the ground. I went down there. The last car was just a little below the crossing when it stopped. I never noticed how many coaches were on the train. I never saw the parties at all. I waited and went down afterwards. After the train had stopped and was standing there I did not notice anything in regard to any signals or sounds from the engine, by the way of a bell or whistle (T. p. 56). I heard no bell, whistle or alarm after it left the first crossing. I saw the train all the time from that signal. Washington Avenue is the one running north and south by the graveyard. The crossing that it whistled at is the one there by the graveyard. The train was on the Fowler side of the graveyard when it gave that whistle (T. p. 57).

Cross-examination.

(By Mr. CORY.)

It seems to me as though that train had been coming along through Selma at about that time of day, that speed, coming through that way, a year or more. I had been living there about 7 years before the accident.

Q. You saw this train come through frequently, did you not, about that time of day?

A. Well, I would not say positively. I know that I seen them coming through there quite a good many times, running pretty good speed.

Q. Well, what was there to call your attention to the fact that you didn't hear any whistle or bell? What impressed it upon you, if anything?

A. Well, I was looking right at the cars and motor

(Tesimony of John Bridges.)

[56] truck both, and if there was any whistle or alarm, I didn't hear it at all.

Q. You don't remember hearing the bell on the day preceding the accident, do you, or any other time, or the whistle, either?

A. I didn't hear an alarm of any kind.

The COURT.—He asked if you heard the bell ring at any other times, on this train?

A. At times it had.

Q. At other times you heard it ring.

A. Yes, other times.

Mr. CORY.—Q. Do you remember any time now when you remember that it did ring?

A. But that one time I didn't. But once in a while before the bell would ring. I was not out there paying attention to whether the whistle blows or the bell rings on that train when it goes by, I am not there every morning. It hardly ever goes through but what I pay attention to it when I am at home, whenever I am outdoors; I do if I am there in the yard. I didn't hear the whistle that morning or the bell either (T. p. 59). The train was coming along about 30 miles an hour, something like that. Sometimes before and afterwards it came through slower than that. Some mornings it comes through a deal faster. When the train is on time it is generally running something like that, about 30 miles an hour. I didn't hear the bell ring or the whistle. I am pretty sure that it didn't ring on that occasion. Of course, I don't know how about that, I didn't hear it ring or hear it whistle, either. I did not

(Testimony of John Bridges.)

shortly after this accident talk it over with anybody, and nobody asked me if I heard the bell ring, shortly afterwards. There was one party, I believe there was, that I was talking with. As to whether the bell rang or not was not called to my attention immediately after the accident. I first considered the question of whether it did ring or not about half an hour or three-quarters after.—That is when the party asked me. I testified at the Coroner's inquest. They asked me there about the bell ringing. The Coroner's inquest was held the next day at Selma, on the 23d of May (T. p. 61). I was asked at that time both as to the whistle and bell (T. p. 62). [57]

**Testimony of Florence Boles, for Plaintiffs.**

FLORENCE BOLES, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. KAUCHE.)

My name is Mrs. Florence Boles. I live at 2343 Whitson Street, Selma, California. I was living in Selma on May 22d, 1914. I know the place where the collision occurred in which George R. Wright was killed. I was about two blocks from the place of the accident, west of it. I live on the west side of the track. When I heard the crash I didn't know it was an accident particularly, but I heard the crash and looked out. I could see the place from where I was. I saw nothing but dust. My daughter was with me and she said, "Something has happened." I couldn't say whether it was a great im-

(Testimony of Florence Boles.)

pact or shook the earth so far as our locality was concerned. Prior to that time I had been indoors. I had noticed the train coming in. I didn't notice any bells, or whistling; I just heard the rumbling of the train (T. p. 63). I did not notice any ringing of bells or blowing of whistles after the crash. I went over to the scene of the accident afterwards. I saw the automobile and train. I might have counted how many coaches there were at that time, but I couldn't say at this time how many there were.

Cross-examination.

(By Mr. CORY.)

There is just one block between our street and the railroad. I presume I heard the rumbling of the train long before it passed my house. It proceeded on and presently I heard the crash. The only thing that called my attention to the train that morning at all was that I expected to do some work that day that I was getting at rather late. I just remarked that the train was in, that it was coming (T. p. 64). I had not paid any attention to the clock. I knew about what time the train was due. [58] It was running on that schedule for some little time. The train passing was what called my attention to the time of day (T. p. 65).

**Testimony of Wade Cargile, for Plaintiffs.**

WADE CARGILE, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. KAUCHE.)

My full name is Joe Wade Cargile. I live at

(Testimony of Wade Cargile.)

Selma. This last time I have lived there a little better than three years. I am thirty-seven years old. My sight and hearing are fairly good; I wear glasses. I was in Selma on May 22d, 1914. After there was a collision there on the crossing—extension of Arrant Street and Southern Pacific track—I went to the scene of the accident (T. p. 65). I did not hear the crash. I was unloading poles down near the depot, two blocks from where the train struck the machine. I was in the draying business, working for the deceased, in his employ. I had a team of horses there with me. The siding is probably 10 ft. from the main track, possibly a little more, where I was working. I was on the opposite side of the main track. The first I knew of it some one said there was an accident up there; they heard the train coming or looked up that way. There was quite a few of us there. I don't remember just exactly what it was; some one called my attention to it first. Prior to that I had heard no warning sounds of the train, either whistle or bell. When I got to the place of the accident the engine, it seems to me, must have been a third of the way across the block, anyway; I don't remember just about that. I didn't notice how many coaches there were or where the rear coach was. The first thing I saw was the planks off the truck on the engine and the next thing, I believe, was Mr. Wright's body. As far as I knew he was dead (T. p. 67). I don't think I saw Mr. Tucker. Of course I was concerned when I saw it was Mr. [59] Wright. I did not pay much attention to anything



(Testimony of Wade Cargile.)

else. I met Mr. Wright when he first came from the East to Selma—I have been here 13 years and I don't think I had been here very long when he came—probably 10 or 12 years, something like that. I knew something of his age; he was about two years older than I; that would have made him about 37. I had been in his employ, I believe, a little over a year. He was in the transfer, draying business. I think he had been conducting that for himself and with his father since he had been in Selma. As far as I knew he had been in the business all that time. After his death I did not purchase or take over or conduct the business at once. I believe we bought it about the 1st of December following. I had charge of it, conducting it for the widow, from May to December, and then I purchased it and I now have the business.

#### EXCEPTION NO. 7.

Mr. KAUKER.—Q. Now, do you, from your knowledge of his affairs and the business that he transacted and the business that you transacted after his death and since up to December since then, know approximately what his net earnings would be or were from that business per month, after paying the running expenses of the business?

Mr. CORY.—One minute. I object to that irrelevant, incompetent and immaterial and not a proper estimate on which to base damages, calling for the opinion of the witness and not seeking to elicit any fact.

The COURT.—He asks if he knows. You can an-

(Testimony of Wade Cargile.)

swer that question yes or no.

A. Well, I can get pretty close to it.

Mr. KAUKKE.—Q. And what were his net earnings per month on an average, approximately?

Mr. CORY.—We make the same objection, if the Court please.

The COURT.—Objection overruled.

A. Well, something near, his net earnings were something near [60] \$150 a month, I think (T. p. 68).

WITNESS—(Continuing.) The business varied at different seasons of the year. Of course we have more business in the summer and fall, during the fruit season, than we do at other times. I knew his family prior to his death. I had been at his house every day for about three months, I believe, after I commenced to work for him. He was very strong, very robust, a good man physically, and very industrious. He did not drink at all to excess at any time that I know of. If he did it couldn't be told on him, I never knew it. As far as I know he was kind to his family and his domestic relations were happy and agreeable as much so as could be. I knew the two children, the girl and boy (T. p. 69).

Cross-examination.

(By Mr. CORY.)

I have talked this over with some people as to what I thought Mr. Wright's business was worth, not to any great extent. They just asked me.

Mr. CORY.—Q. Are you making \$150 a month

(Testimony of Wade Cargile.)

now? A. Why, I expect in the run of the year, take the 12 months, we will probably exceed that. Mr. Wright had been in the dray business ever since he came to California, has been connected with his father as owner. Mr. Wright left some property in Selma; I don't recall just what it was appraised at. He had a very nice piece of property there; he valued it I think at something like \$4000, or maybe more, I don't know just what. He had a machine (T. p. 70). It was a Ford. We gave him \$1500 for the business, Mr. Steele and I. Mrs. Wright has no further interest in the business. Mr. Wright was alone in the business (T. p. 71). [61]

**Testimony of Mrs. Gertrude Wright, in Her Own  
Behalf.**

MRS. GERTRUDE WRIGHT, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. KAUCHE.)

My age is 32. I now reside in Fresno. On May 22d, 1914, I was residing at 2723 Locan Street, Selma (T. p. 71). At that time I was the wife of George R. Wright. His age at that time was 37. We were married in 1901. When he was killed we had been married 13 years. Two children were born to that marriage and both are now living. The one named in the Complaint, Orena, is a girl; she was 12 years old; and Ora Wright, the boy, was 10. At the time the complaint was filed they were practically a year older. My husband and I lived together contin-

(*Tesimony of Mrs. Gertrude Wright.*)

uously from the time we were married to the 22d day of May, 1914. We were married at Clinton, Missouri. We had been at Selma nine years when Mr. Wright was killed. My husband was engaged in the truck and transfer business at the time of his death (T. p. 72). He had been engaged in that business in Selma, for himself, for five years. Before that time he only worked for his father. At the time of his death he had bought and was paying for that business on installments. We owned the home there but it was in the building and loan. I was carrying on a millinery business myself. At the time of his death I had no other source of income than my earnings and his and the income from that business. I helped my husband with his books in his draying business. From my knowledge, as his wife, of the income and the collections, from the books, I made some of the collections and sent out the bills.

#### EXCEPTION NO. 8.

Mr. KAUKÉ.—Q. Do you know after he had paid the running expenses, teams, feed, different expenses there might be of the wagons, the net income from the business there?

Mr. CORY.—One minute, I object to it as irrelevant, incompetent and immaterial and not a proper basis for damages, speculative [62] and calling for the opinion of the witness (T. p. 74-75).

The COURT.—Objection overruled.

Mr. KAUKÉ.—You may answer.

A. \$175 a month.

Mr. KAUKÉ.—\$175 per month?

(Tesimony of Mrs. Gertrude Wright.)

A. Yes, \$150 to \$175.

WITNESS (Continuing.) It would average \$175, some months larger than others. At time in the fall it has been \$200 or \$225. Mr. Wright's eyesight and hearing were good. His weight I should judge was about 184 pounds. He was very robust, not at all sickly. He was always working.

#### EXCEPTION NO. 9.

Mr. KAUKÉ.—Q. Always at work. Now, what were his habits as to coming home and being in the society of his wife and children?

Mr. CORY.—Objected to as immaterial for any purpose, if the Court please, not the basis of damage.

The COURT.—There is no allegation in his complaint as to the relations between him and his wife.

Mr. KAUKÉ.—Well, the purpose of the question is, that, while we can recover only the pecuniary damages, the pecuniary damages are based upon loss of society and care and comforts, not anything, of course, for the sorrow, or injured feelings, and under the general allegation, the prayer for damages, we are quite sure we are entitled to prove the loss of society (T. p. 75–76). In other words if he was not kind and attentive to his family, it would be one thing that could be shown to the contrary, as to how much they have lost by this killing.

The COURT.—It has been customary, as far as my information goes, to allege in the complaint that the relations of husband and wife have been agreeable and pleasant—devoted or attentive to his wife and children, and all that sort of thing.



(Tesimony of Mrs. Gertrude Wright.)

Mr. CORY.—I understand there must be an issue of that kind in order to entitle them to prove it.

Mr. KAUKÉ.—While I have not the authority here to read to the Court [63] I am quite sure that is not the rule of pleading in this State.

The COURT.—Objection is overruled.

(Question read.) A. He was always there, only when his business called him away. (Witness continuing.) His home life was happy with myself and the children; nothing in the way of discord that I recall or know of. We had our living and we paid \$50 a month on the business and \$333 and something on the house (T. p. 76). So far as I know, there was none of his money devoted to any other source than the paying for the business and the home and the support of his family.

Cross-examination.

(By Mr. CORY.)

He did not own the business, he was paying for a portion. He owed over \$500 on the business when he was killed. Mr. Wright originally paid \$1500 for the business, or agreed to pay \$1500, and of that had paid all but \$500 at the time of his death. That was the only business that he had. He was paying \$50 monthly on the business. He had owned it over four years. Four years before his death he agreed to pay \$1500 for it (T. p. 76-78). During that four years he had paid a thousand dollars on it and at the end of the four years still owed a little over \$500.

There was then introduced by counsel for the plaintiffs the American table of mortality, concern-

ing the expectancy of life of the deceased and each of the plaintiffs, from which it appears that the expectancy of life of Mr. Wright was 30.35 years; that the expectancy of life of Mrs. Wright was 35.33 years; and that the expectancy of life of the two children was respectively 47.45 years and 48.72 years.

[64]

It was thereupon admitted that the appointment of Gertrude Wright as guardian *ad litem* was made as alleged in the Complaint, whereupon plaintiff rested.

The defendant thereupon made a motion for nonsuit, upon the grounds that the evidence of the plaintiff showed beyond any substantial or other conflict that the accident complained of was caused solely and alone by the contributory negligence and want of care of the deceased; that it disclosed that the driver of the machine and the deceased had a clear and unobstructed view of the track upon which the train was approaching when they were a distance of 145 feet from the track on which the accident occurred, and if, during any portion of that distance, either the deceased or the driver had looked in the direction from which the train was approaching, they could have seen it and thus avoided the accident.

After argument, the motion was submitted to the Court for decision and was by the Court overruled, to which ruling the defendant then and there excepted.

#### EXCEPTION NO. 10.

The defendant declined to introduce any testimony

in its behalf and the case was thereupon submitted by it and both sides rested.

By consent, the map herein referred to, was introduced in evidence and marked Plaintiff's Exhibit "A."

The foregoing is the substance of all the testimony taken at the trial of the case.

### **Instructions to the Jury.**

The Court thereupon gave the following instructions to the jury: [65]

The COURT.—“Gentlemen of the jury, every case should be tried according to law and the evidence that is admitted in the case. This is an action of negligence and negligence is defined by the law. You should not be influenced by reason of passion, prejudice or sympathy. It is your duty to judge this case without any such considerations; you should not be prejudiced against the defendant by reason of it being a corporation, and it should have just as fair a trial as if it were a private individual.

Negligence is the omission to do something which a reasonably prudent man, guided by those considerations which usually regulate the conduct of human affairs would do, or is the doing of something which a prudent and reasonable man would not do. It is not intrinsic or absolute but is always relative to some circumstance of time, place or person.

Negligence is of no consequence unless it was the proximate cause of the injury.

The proximate cause of an injury is that cause which in natural and continuous sequence produces the injury, and without which the result would not

have occurred. It is the efficient cause, the one that necessarily sets the other causes in operation.

This definition of negligence as it relates to the cause of an accident, applies alike to the defendant and to the conduct of the deceased.

When we speak of contributory negligence of the deceased, we mean the kind of negligence above defined.

The plaintiffs have the burden of proving that the defendant was guilty of negligence. The burden is sustained when you are satisfied that the greater weight of the evidence is with the plaintiffs. When you come to consider the question of contributory negligence of the deceased, the burden of [66] proof is upon the defendant to show that the deceased was guilty of contributory negligence, and you must be satisfied that the weight of evidence shows that the deceased was guilty of contributory negligence before you can decide that he was.

The question whether or not there was negligence in a particular case should be determined from the circumstances and conditions, as shown in evidence, at the time, surrounding the person against whom the negligence is charged.

The negligence of a servant acting within the scope of his employment is the negligence of the master.

You are further instructed that it is the duty of a railroad company, where its tracks cross the streets of a city, to take reasonable precautions to protect against injury from the movement of its engines and cars, travelers upon the same highway.

Section 486 of the Civil Code of this State provides as follows: 'A bell, of at least twenty pounds

weight, must be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road, or highway, and be kept ringing until it has crossed such street, road, or highway; or, a steam whistle must be attached and be sounded, except in cities, at the like distance, and be kept sounding at intervals until it has crossed the same.

The corporation is liable for all damages sustained by any person, and caused by its locomotives, trains, or cars, when the provisions of this section are not complied with.

You are therefore instructed that, should you find from the evidence in this case that on approaching the crossing in question at the time of the accident, there was at no time any bell rung or whistle sounded, or other warning signal given by the defendant, then such failure on the part of the defendant constituted presumptive negligence. [67]

An ordinance of the city of Selma, fixing the maximum rate of speed at which railroad trains may be operated within the corporate limits of the city, has been introduced in evidence, and, upon the question of the alleged negligence of the defendant, you are instructed that if you find that the defendant failed to comply with such municipal ordinance at the time in question, then such failure on its part constituted presumptive negligence.

Before the plaintiff can recover, it must appear from the evidence that the accident resulting in the death of George R. Wright was caused by the negligence of the defendant, unmixed with any negligence



of the deceased, for if negligence on the part of the deceased contributed in any manner, directly or approximately, to his death, there can be no recovery.

You are instructed that the law is well settled that the railroad track of a steam railway must of itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for approaching trains, and that, if he sees an approaching train upon the track, or could have seen the same if he had looked, he must not place himself in a dangerous position by attempting to cross in front of it, and if when the approaching train is in plain view he attempts to cross in front thereof, and an accident happens by which he is injured, he is guilty of contributory negligence.

You are further instructed that there is no evidence before this jury that either the fireman or engineer had any actual knowledge or notice that either Mr. Tucker or Mr. Wright were crossing or attempting to cross the railroad track in front of the approaching train, and this jury can draw no inference of negligence on the part of the defendant because of the fact that the fireman or engineer might have known of the danger in which Mr. Tucker and Mr. Wright were placed. In other words, the last [68] chance doctrine, so-called, has no application to the facts of this case, and you are to determine this case solely under the instructions given you by the Court.

You are further instructed that the engineer and fireman had a right to assume that the driver of the truck was in possession of his faculties and would

remain in a place of safety and not recklessly expose himself or Mr. Wright to danger.

It is alleged in defendant's answer in this case that the alleged death of said George R. Wright was occasioned solely and alone because of the carelessness and want of care of said deceased and the person driving and in charge of the said automobile truck.

If you find that the automobile truck was operated and driven solely by the witness Tucker, and that the deceased had no control over the operation of the truck, or no right to exercise control over same, and that he did not exercise any supervision or control over the same, then you are further instructed that in such case the negligence of Tucker (if he was negligent) is not to be imputed to the deceased so as to constitute contributory negligence on his part; but that to sustain the defense of contributory negligence, the defendant must prove or the evidence must show personal failure, on the part of the deceased to exercise ordinary care.

In other words, if you find that the deceased, Wright, was riding in the automobile truck, driven by the witness Tucker, and that he, Wright, had neither control of nor the right to control, such driver, and that he was not exercising or assuming control over the truck or such driver at the time of the accident, then, to sustain the defense of contributory negligence on the part of the deceased, it must appear from the evidence that he, personally, as distinguished from the driver of the truck, failed to exercise ordinary care at and immediately prior to the time of the accident which caused his death.

But deceased was required to exercise ordinary care in approaching said crossing. [69]

If you believe from the evidence that the defendant was negligent as alleged in the complaint, and that the death of the deceased was thereby approximately caused, without contributory negligence on his part, you will find for the plaintiffs, and assess the amount of damages they are entitled to recover.

I instruct you that the defendant is entitled to have you consider upon the question of the probable value of the decedent's life, the uncertainty of life itself, the uncertainty of health, and the uncertainty of constant employment. It is your duty to take these elements into consideration.

I further instruct you that in considering the probable value of the life of George R. Wright to these plaintiffs, you have no right to take into consideration any possible opportunities that he might have had of acquiring wealth or fortune in the future.

There have been introduced in evidence mortality or expectancy tables for the purpose of showing the probable duration of life of the deceased, and also of each of the plaintiffs.

In determining the probable length of life the deceased would have enjoyed, you are entitled to consider those mortality or expectancy tables as evidence bearing on that question, and as tending to show the ordinary experience in such cases. You may also consider those tables relative to the probable duration of the life of the plaintiffs respectively, but only for the purpose and extent of ascertaining

whether their expectancy of life is or is not as great as that of the deceased. You cannot award damages to any of the plaintiffs for any period extending beyond the probable term of the life of the deceased.

It is alleged in the complaint in this action that the ages of the children of the deceased at the time of filing the complaint were eleven and thirteen years, respectively, and you are instructed that the pecuniary interest of children in the [70] life of their parent does not necessarily end at the age of majority; and in this case, if your verdict shall be for the plaintiff, you may allow for the probable loss of any benefit, if any, of a pecuniary value, which the children would probably have received from their father after the arrival at majority.

You have no right to take into consideration in fixing the amount of damages, any personal grief or mental distress or wounded feelings which plaintiffs to wit, the widow and children of said deceased, may have experienced by reason of the death of said George Reuben Wright. The sorrow and grief that his death may have caused them are not regarded by the law as proper things to be considered in a verdict for damages, and nothing can be added by way of damages on that account.

The verdict in a case of this kind is to be a practical one, not a sentimental one, and it is to be arrived at pursuant to the rules of law, and should fix the damages on no other basis whatever, except the pecuniary or money loss which the said widow and children may have sustained by reason of the death of George Reuben Wright. The plaintiffs can recover

nothing in this action by way of damages, except for actual pecuniary loss, and in passing upon this question of pecuniary loss, the jury are not allowed to speculate generally or indulge in presumption without regard to the general evidence in the case, but they should determine the question by the evidence which has been introduced before them.

In determining the amount of damages, it is your duty to take into consideration the loss sustained by the plaintiffs in being deprived of the support of the deceased and his comfort, and to consider the value of the father's services to the plaintiffs, his care and labor bestowed upon his children, his ability to care for them, train and assist them and his efforts for their welfare."

The foregoing were all of the instructions given the jury.

The defendant thereupon excepted to each and every one of the instructions given by the Court and each and every part thereof.

#### EXCEPTION NO. 11. [71]

#### **Instructions Requested by Defendant.**

#### EXCEPTION NO. 12.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

"You are instructed that the law is well settled that the railroad track of a steam railway must of itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for approaching trains, and that if he sees an approaching train upon the track, or could have seen the same if he had looked, he must



not place himself in a dangerous position by attempting to cross in front of it, and if when the approaching train is in plain view he attempts to cross in front thereof, and an accident happens by which he is injured, no recovery can be had against the railroad company for such an accident.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give said instruction.

#### EXCEPTION NO. 13.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“You are further instructed that the direct and approximate cause of the accident in which George Reuben Wright was killed was the contributory negligence and want of care of the deceased and the driver of the truck, and your verdict therefore will be in favor of the defendant.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give said instruction.

#### EXCEPTION NO. 14.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“If you find from the evidence in this case that either the deceased, George Reuben Wright, or the driver of the truck, [72] could have seen the train approaching the crossing at which the accident oc-

curred before they attempted to cross the track upon which the train was approaching, and if the accident occurred as the result of their attempting to cross in front of the approaching train while it was in plain view, then the plaintiffs are not entitled to recover against the defendant and your verdict will be in its favor."

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give said instruction.

#### EXCEPTION NO. 15.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

"You are further instructed that if you believe from the evidence that the direct and proximate cause of the accident was the attempt on the part of George Reuben Wright, deceased, and the driver of the truck, to cross the track in front of the approaching train, or if they had listened they could have heard it in time to have stopped their truck and prevented the accident, then you are instructed that the accident was occasioned by the negligence and want of care of George Reuben Wright and the driver of the truck and that the defendant was not liable, and your verdict accordingly will be in favor of the defendant."

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then

and there duly excepted to the refusal of the Court to give the said instruction.

EXCEPTION NO. 16.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“You are further instructed that as George Reuben Wright and the driver of the truck, at the time of the accident were both men of mature years and were in full possession of their [73] senses, and if they had looked could have seen the approaching train in time to have prevented the accident, the engineer was entitled reasonably to believe that they knew of the approaching train and would, in obedience to the ordinary instinct of self-preservation, not attempt to cross the track, or pass in front of the train, but would take such steps as reasonable to prevent an accident, and the employees of the defendant company were not required to assume that they would continue in attempting to cross the track in front of the approaching train to a point which would endanger their lives and limbs, and that it was not negligence for the engineer or fireman, under the circumstances, to indulge the presumption that they would not attempt to cross the track in front of the train, but would stop and wait for the train to pass.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

EXCEPTION NO. 17.

Thereupon the defendant requested the Court in

writing to charge the jury as follows:

“You are further instructed that in crossing a track, which is a sign of danger in itself, the law does not entitle one to speculate as to whether he will be able to cross in safety before an approaching train, and if he makes the attempt and is not successful, then I charge you that such accident is the direct and proximate result of attempting to cross the track. If, therefore, you believe in the present case that the accident to the deceased was directly occasioned by the fact that he and the driver of the truck had negligently attempted to cross the track in front of the approaching train and the accident occurred as the result of such attempt, then I instruct you, as a matter of law, that the accident [74] was occasioned by the contributory negligence and want of care of the deceased and the driver of the truck, and your verdict will, therefore, be in favor of the defendant.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

#### EXCEPTION NO. 18.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“Passion, prejudice and sympathy are not to enter into your consideration of this case. It is your duty to judge this case uninfluenced by any consideration of passion or prejudice and unaffected by any sympathy whatsoever.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

EXCEPTION NO. 19.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“The fact that the Southern Pacific Company is a corporation is not to be considered by you in this case. It is your duty to give that defendant the same fair trial as if it were a private individual.”

Which instruction the Court thereupon declined to give.

And the defendant, thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

EXCEPTION NO. 20.

Thereupon the defendant requested the Court in writing to charge the jury as follows: [75]

“Before the plaintiff can recover, it must appear from the evidence that the accident resulting in the death of George Reuben Wright was caused by the negligence of the defendant, unmixed with any negligence of the deceased or the driver of the truck, for if negligence on the part of the deceased or the driver of the truck contributed in any manner, directly or approximately to the death of said George Reuben Wright, there can be no recovery, and your verdict must be for the defendant.”

Which instruction the Court thereupon declined to give.



And the defendant thereupon, by its counsel, then and there excepted to the refusal of the Court to give the said instruction.

#### EXCEPTION NO. 21.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“You are further instructed that a railroad track upon which trains are run is itself a warning to any person who has reached the years of discretion and who is possessed of ordinary intelligence, that it is not safe to cross it without the exercise of constant vigilance in order to be made aware of the approach of a train and thus be enabled to avoid receiving an injury, and the failure of such person so situated with reference to a railroad track to exercise such care and watchfulness and to make use of all his senses in order to avoid the danger incident to such situation is negligence and prevents recovery. If you find, therefore, that if either the deceased or the driver of the truck, in attempting to cross the railroad track in front of the approaching train which collided with said truck, failed to exercise such care and watchfulness, or to make use of all his senses in order to avoid the danger incident to crossing said track, then I instruct you that the plaintiffs cannot recover, and your verdict will be in favor of the defendant.”

Which instruction the Court thereupon declined to give. [76]

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

EXCEPTION NO. 22.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“You are further instructed that as a railroad track is a sign of danger in itself, that it was the duty of the deceased and of the driver of the truck, in approaching the track upon which the accident occurred, to exercise constant vigilance and watchfulness and care in order to see or hear an approaching train, and thus avoid injury, and if, for any reason, they could not see the approaching train because their vision was obstructed, they were required to use all the more vigilance for that reason, and in any event, the law cast upon them the duty to approach the track so slowly as to give them complete control of their truck and enable them to stop instantly if occasion required. If, therefore, you believe from the evidence that either George Reuben Wright or the driver of the truck, in attempting to cross the track in front of the approaching train, did not exercise the same caution herein stated, then they were guilty of negligence themselves and no recovery can be had against the defendant.”

( Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

EXCEPTION NO. 23.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“If you believe from the evidence that either

George Reuben Wright, deceased, or the driver of the truck, either saw or heard the train approaching and undertook to cross ahead of it, that [77] such attempt is conclusive evidence of negligence on his part, and the plaintiffs cannot recover.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give said instruction.

#### EXCEPTION NO. 24.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“You are further instructed that the defendant is not liable for the death of George Reuben Wright unless it occurred solely by its fault and negligence, and not in any degree through the fault or negligence of the deceased.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

#### EXCEPTION NO. 25.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“You are further instructed that if you believe from the evidence that the approaching train was in plain view of either the deceased or the driver of the truck before they reached the track upon which the accident occurred, and that if either of them had

looked he could have seen it before they crossed the track, or if either of them had listened he could have heard the train approaching before they crossed the track, and that if either of them had looked and listened before attempting to cross the track, he could have seen and heard the approaching train and thus avoided any danger, and that while the train was so approaching in plain view of the deceased and the driver of the truck, they attempted to cross the track in front of the approaching train, and that by reason only of any such attempt the accident occurred resulting in the death of George Reuben Wright, then I instruct [78] you that such conduct on the part of the deceased and the driver of the truck was negligence and the plaintiffs cannot recover.”

Which instruction the Court thereupon declined to give.

And the defendant, thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

#### EXCEPTION NO. 26.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“You are further instructed that damages in such a case as this can only be given for the actual pecuniary injury or loss suffered by the wife and children of the deceased. In other words, in a case such as the present, if you find that the plaintiffs are entitled to damages, then damages can only be given for the pecuniary injury or loss the wife and children have sustained, or will sustain, by the death of George Reuben Wright, and in this regard I charge you that

no damage can be given to the plaintiffs for the grief or sorrow or pain, or injury to their feelings, or for loss of society of the deceased, or for his pain or suffering, or for the loss of his comfort and protection. The law simply measures the injury complained of by the loss it has caused, or will cause, in dollars and cents. In passing upon this question you are not allowed to speculate or indulge in presumptions not warranted by the evidence, but you must determine this question solely by the evidence introduced before you. In passing upon the question of pecuniary injury or loss sustained by the plaintiff you must be governed solely by the evidence introduced; you must not indulge in conjectures or speculations not supported by the evidence."

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

#### EXCEPTION NO. 27.

Thereupon the defendant requested the Court in writing to charge the jury as follows: . [79]

"You are further instructed that if you believe from the evidence that the employees of the defendant company failed to give the warning of the approach of the train either by blowing the whistle or ringing the bell, yet, if you further believe that under the instructions herein given you that either the deceased, or the driver of the truck, if he had looked could have seen, or if he had listened could have heard the approaching train in time to have avoided



the accident by the exercise of reasonable care, then the plaintiffs are not entitled to recover.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

#### EXCEPTION NO. 28.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“While it is true that the law permits the plaintiff to recover damages for the loss of the comfort, society and protection of the deceased, you must remember that such damages are in no way concerned with the question of their sorrow, grief or mental distress because of the loss of the deceased, and you must award plaintiffs nothing in this respect. The only amount that you can give under the law so far as the comfort, society and protection are concerned is such pecuniary loss as the widow and children of said deceased may have sustained with reference to those elements, and you must therefore examine the evidence upon the subject of comfort, society and protection to determine what pecuniary loss they sustained in that regard, if any, and you cannot award plaintiffs anything at all in this case on this head of damages in excess of such pecuniary loss.

I particularly caution you in this case, as a matter of justice to the defendant, that these plaintiffs, so far as comfort, society and protection to said widow and children are concerned, are not entitled to recover anything whatever from the defendant for any

personal [80] distress or grief or injured feeling, no matter how enduring they may be; it is only for comfort, society and protection insofar as those things stand for pecuniary loss that they can recover anything at all on this head."

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

#### EXCEPTION NO. 29.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

"You are instructed that the circumstance that the defendant Southern Pacific Company is a corporation must in no wise affect your verdict in this case any more than if it were an ordinary private citizen. In a court of justice like this, jurors should make no difference between a corporation and an individual. These plaintiffs and the defendant are entitled to justice, and the same justice, and in determining and fixing the amount of your verdict in this case you are always to remember that the defendant corporation cannot be taxed one dollar damages except in accordance with the rules of law, and it is only to the extent that damages are recoverable under the rules of law that any verdict can be rendered against the defendant. It is simply the pecuniary loss of the plaintiff, and nothing more, as such pecuniary loss is prescribed and defined by legal rules, that you can base a verdict upon this case."

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

EXCEPTION NO. 30.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“You are further instructed that neither Mr. Wright nor Mr. Tucker had the right to depend upon the custom, or even the duty enjoined by law, of the engineer or fireman to give the customary signals of the approach of the train, as it was their duty, in approaching the crossing, to look and listen, irrespective of such signals. If, therefore, they could have seen or heard the approaching train if they had looked or listened in time to avoid the accident, then your verdict should be in favor of [81] the defendant, even if you further believe that no warning whatever was given of the approaching train by the employees of the Company.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

EXCEPTION NO. 31.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“You are further instructed that if you believe from the evidence that the train was approaching

the crossing at an excessive rate of speed and in violation of the ordinance, yet, that fact is immaterial if you further believe that if Mr. Wright or Mr. Tucker had looked towards the approaching train, they could have seen it at any time sufficient to have prevented the accident, then the responsibility of the accident lies with Mr. Tucker and Mr. Wright, and your verdict must be in favor of the defendant."

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

#### EXCEPTION NO. 32.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

"You are further instructed that if you believe from the evidence that the employees of the defendant were negligent, that the train was going at an excessive rate of speed, that the whistle of the engine never blew nor the bell rang, and that no warning of any kind was given to Mr. Tucker or Mr. Wright by the engineer or fireman of the train, yet, if you believe from the evidence that Mr. Wright or Mr. Tucker could have seen or heard the approaching train in time to have avoided the accident, if they had looked or listened, then your verdict must be in favor of the defendant."

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then

and there duly excepted to the refusal of the Court to give the said instruction. [82]

EXCEPTION NO. 33.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“You are further instructed that it was Mr. Wright’s duty, in approaching the crossing, equally with Mr. Tucker’s, to have looked and listened for the approaching train. If, therefore, you believe from the evidence, that if Mr. Wright had looked or listened at any time before the truck actually reached the track upon which the accident occurred, he could have seen or heard the train in time to have avoided the accident, then your verdict must be in favor of the defendant.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there excepted to the refusal of the Court to give the said instructions.

EXCEPTION NO. 34.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“You are further instructed that Mr. Wright at the time of the accident was in charge and control of the truck, and therefore the negligence of Mr. Tucker at the time of the accident, if you find that he was negligent, is to be imputed and regarded as the negligence of Mr. Wright. If, therefore, you find under these instructions that Mr. Wright or Mr.



Tucker were negligent at the time of the accident, then your verdict must be in favor of the defendant.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there excepted to the refusal of the Court to give the said instructions.

#### EXCEPTION NO. 35.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“You are further instructed that the evidence in this case is not sufficient to justify a verdict in favor of the plaintiffs, [83] and you will therefore render a verdict in favor of the defendant.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

L. L. CORY,

Attorney for Defendant.

Due service of the within Bill of Exceptions is hereby admitted by copy this 23d day of June, 1916.

GALLAHER & ATEN,

FRANK KAUCHE,

Attorneys for Plaintiffs.

It is hereby stipulated by and between the parties to this action that the foregoing Bill of Exceptions is correct in all respects and that the same may be approved, allowed and settled and made a part of the record herein to be used by the defendant upon its

motion for a new trial herein and also upon appeal.

Dated, this 28th day of June, 1916.

GALLAHER & ATEN,

FRANK KAUCHE,

Attorneys for Plaintiff.

L. L. CORY,

Attorney for Defendant. [84]

The foregoing Bill of Exceptions is hereby allowed and settled as correct in all respects, and made a part of the record herein to be used on the motion of the defendant herein for a new trial and also upon appeal or writ of error to the Circuit Court of Appeals.

OSCAR A. TRIPPET,

Judge.

Settled, allowed, signed and filed July —, 1916.

\_\_\_\_\_,

Clerk.

\_\_\_\_\_,

Deputy Clerk.

[Endorsed]: 71-Civil. In the District Court of the United States, Southern District of California, Northern Division. Gertrude Wright et al., Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. Defendant's Bill of Exceptions. Filed Jun. 29, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. L. L. Cory, Attorney at Law, First National Bank Building, Fresno, Cal., Attorney for Defendant. [85]

*In the District Court of the United States, Southern  
District of California, Northern Division.*

No. 71—CIVIL.

GERTRUDE WRIGHT and ORENE WRIGHT  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*.

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant.

**Petition for Writ of Error.**

The Southern Pacific Company, a corporation, the defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered on the 5th day of May, 1916, a new trial of which cause was heretofore denied on the 23d day of October, 1916, comes now by L. L. Cory, its attorney, and files herewith an assignment of error and petitions said Court to allow said defendant to procure a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error

by the United States Circuit Court of Appeals for the Ninth Circuit.

L. L. CORY,

Attorney for Petitioner.

Due service of the foregoing Petition for Writ of Error is hereby admitted this 27th day of November, 1916.

GALLAHER & ATEN,

FRANK KAUCHE,

Attorneys for Plaintiffs. [86]

[Endorsed]: No. 71-Civil. In the District Court of the United States, Southern District of California, Northern Division. Gertrude Wright et al., Plaintiffs, vs. Southern Pacific Company, Defendant. Petition for Writ of Error. Filed Nov. 28, 1916, Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. L. L. Cory, Attorney at Law, Fresno, Cal., 410-414 Cory Bldg. [87]

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*In the District Court of the United States, Southern District of California, Northern Division.*

GERTRUDE WRIGHT and ORENE WRIGHT  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY (a Corporation),

Defendant.

**Assignment of Errors.**

Comes now the defendant above named and files the following statement of errors upon which it will rely upon its prosecution of the writ of error in the above-entitled cause, petition for which writ is filed at the same time with this assignment.

## 1.

That said Court erred in overruling the objection of counsel for defendant to the following question which was asked Fred Tucker, a witness for the plaintiff, upon direct examination, specified in the Bill of Exceptions as Exception No. 1, as follows:

“Mr. KAUKÉ.—Q. Did Mr. Wright have anything to do with the operating of the machine?

Mr. CORY.—Objected to as irrelevant, incompetent and immaterial, not tending to prove any issue in the case.

The COURT.—The objection is overruled.

(Question read.) A. None whatever.”

## 2.

That said Court erred in overruling the objection of counsel for defendant to the following question which was asked the said [88] witness, specified in the Bill of Exceptions as Exception No. 2, as follows:

“Mr. KAUKÉ.—Q. Did he assume, in other words, did he give you any directions or instructions or say anything to you as to how it should be operated at all? A. No, sir.

Mr. CORY.—Objected to as irrelevant, incompe-



tent and immaterial, calling for hearsay testimony.

The COURT.—The objection is overruled.

Mr. KAUKÉ.—Your answer. A. No, sir.”

3.

The Court erred in overruling the objection of counsel for defendant to the introduction in evidence of Section 17 of Ordinance No. 51 of the city of Selma, specified in the Bill of Exceptions as Exception No. 3, as follows:

“Mr. GALLAHER.—I have it. We desire to introduce in evidence, so that this book may not be retained here, Section 17 of Ordinance No. 51 of the city of Selma, commonly known and entitled as the misdemeanor ordinance of the city of Selma. We offer Section 17.

Mr. CORY.—We object to that as irrelevant, incompetent and immaterial, if the Court please, now shown to have been adopted in any manner at any meeting of said city trustees, or published as required by law, or duly authenticated in any way.

Mr. GALLAHER.—The statute providing for the keeping of an ordinance book in the State of California provides it shall be *prima facie* evidence as to the existence, force and effect of the ordinance as therein set forth.

The COURT.—The objection is overruled.

Mr. CORY.—We except.

Mr. GALLAHER.—We desire to read into evidence, so that the book may be returned, Section 17, appearing at page 197 of the [89] Book or Ordinances.

Mr. KAUKÉ.—Mr. Cory, do you want the whole

ordinance read? Do you desire the whole ordinance read?

Mr. CORY.—No, I don't care anything about it.

Mr. GALLAHER.—(Reading:) 'Section 17. Any person who shall run or propel any railroad car, locomotive, hand-car, horse car or any train of cars in this town at a greater rate of speed than eight miles per hour, or in such manner as to endanger or obstruct the free passage of any public street, is guilty of a misdemeanor.' The certificate is: 'Passed at a regular session of the board of trustees of the town of Selma held this 26th day of December, 1896'—giving the vote and certified by the clerk. That is all."

4.

That said Court erred in overruling the objection of counsel for defendant to the following question which was asked said witness, Fred Tucker, and in refusing to strike out his answer thereto, specified in the Bill of Exceptions as Exception No. 4, as follows:

"Mr. KAUCHE.—This man, Mr. Wright, that was with you, if you know from knowledge you then had, or since obtained, what was his age, or about what at that time?

Mr. CORY.—I object to that as calling for the opinion of the witness. I suppose there are better ways of proving that, if the Court please.

The COURT.—Objection overruled.

A. I would judge Mr. Wright to be about 30 years old. I don't know what his age was.

Mr. CORY.—I move that the answer be stricken out, if the Court please.

The COURT.—Overruled.”

5.

That the Court erred in overruling the objection of counsel [90] for defendant to the following question which was asked the above-named witness, specified in the Bill of Exceptions as Exception No. 5, as follows:

“Mr. KAUKKE.—Q. Now, what was said and done between you and the owner of the truck and the man that let it be used as to what you were to do with reference to it?

Mr. CORY.—We object to that as irrelevant, incompetent and immaterial and calling for hearsay.

The COURT.—Overruled.

A. The conversation over the phone?

Q. Yes.

A. Mr. Phelan said he would rent Mr. Wright the truck for \$15 a day providing I would drive it, but he would not rent it to him, let him drive it, because he didn't know him, and didn't know whether he knew how to drive it or not, and he knew that I knew how to drive it.”

6.

That the Court erred in overruling the objection of counsel for defendant to the following question which was asked the witness Oscar Thurman Hess, specified in the Bill of Exceptions as Exception No. 6, as follows:

“Mr. KAUKKE.—Q. What rate of speed, as near as you could estimate from your observation of the

speed of the trains and automobiles was the train going when you first saw it?

Mr. CORY.—Objected to as irrelevant, incompetent and immaterial and the witness not shown to be competent.

The COURT.—Overruled.

The WITNESS.—Shall I answer?

The COURT.—Yes.

A. 30 miles.”

7.

That the Court erred in overruling the objection of counsel for defendant to the following question asked the witness Wade [91] Cargile, specified in the Bill of Exceptions as Exception No. 7, as follows:

“Mr. KAUKKE.—Q. Now, do you, from your knowledge of his affairs and the business that he transacted and the business that you transacted after his death and since up to December since then, know approximately what his net earnings would be or were from that business per month, after paying the running expenses of the business?

Mr. CORY.—One minute. I object to that as irrelevant, incompetent and immaterial and not a proper estimate on which to base damages, calling for the opinion of the witness and not seeking to elicit any fact.

The COURT.—He asks if he knows. You can answer that question yes or no.

A. Well, I can get pretty close to it.

Mr. KAUKKE.—Q. And what were his net earnings per month on an average, approximately?

Mr. CORY.—We make the same objection, if the Court please.

The COURT.—Objection overruled.

A. Well, something near, his net earnings were something near \$150 a month, I think.”

8.

That the Court erred in overruling the objection of counsel for defendant to the question asked the last above-named witness, specified in the Bill of Exception No. 8, as follows:

“Mr. KAUKÉ.—Q. Do you know after he had paid the running expenses, teams, feed, different expenses there might be of the wagon, the net income from the business there?

Mr. CORY.—One minute, I object to it as irrelevant, incompetent and immaterial and not a proper basis for damages, speculative and calling for the opinion of the witness.

The COURT.—Objection overruled. [92]

Mr. KAUKÉ.—You may answer.

A. \$175 a month.

Mr. KAUKÉ.—\$175 per month.

A. Yes, \$150 to \$175.”

9.

That the Court erred in overruling the objection of counsel for defendant to the question asked the said witness, specified in the Bill of Exceptions as Exception No. 9, as follows:

“Mr. KAUKÉ.—Q. Always at work. Now, what were his habits as to coming home and being in the society of his wife and children?

Mr. CORY.—Objected to as immaterial for any



purpose, if the Court please, not the basis of damage.

The COURT.—There is no allegation in his complaint as to the relations between him and his wife.

Mr. KAUKÉ.—Well, the purpose of the question is, that, while we can recover only the pecuniary damages, the pecuniary damages are based upon loss of society and care and comforts, not anything, of course, for the sorrow, or injured feelings, and under the general allegation, the prayer for damages, we are quite sure we are entitled to prove the loss of society. In other words, if he was not kind and attentive to his family, it would be one thing that could be shown to the contrary, as to how much they have lost by this killing.

The COURT.—It has been customary, so far as my information goes, to allege in the complaint that the relations of husband and wife have been agreeable and pleasant—devoted or attentive to his wife and children, and all that sort of thing.

Mr. CORY.—I understand there must be an issue of that kind in order to entitle them to prove it.

Mr. KAUKÉ.—While I have not the authority here to read to the Court, I am quite sure that is not the rule of pleading in this State.

The COURT.—Objection is overruled.

(Question read.) A. He was always there, only when his business called him away." [93]

10.

The Court erred in denying the motion of the defendant for a nonsuit, specified in the Bill of Exceptions as Exception No. 10, as follows:

The defendant made a motion for nonsuit, upon

the grounds that the evidence of the plaintiff showed beyond any substantial or other conflict that the accident complained of was caused solely and alone by the contributory negligence and want of care of the deceased; that it disclosed that the driver of the machine and the deceased had a clear and unobstructed view of the track upon which the train was approaching when they were a distance of 145 feet from the track on which the accident occurred, and if, during any portion of that distance, either the deceased or the driver had looked in the direction from which the train was approaching, they could have seen it and thus avoided the accident.

After argument, the motion was submitted to the Court for decision and was by the Court overruled, to which ruling the defendant then and there excepted, as set forth in said Exception No. 2 of the Bill of Exceptions.

11.

That the Court erred in giving the jury the following instructions, specified in the Bill of Exceptions as Exception No. 11, as follows:

The COURT.—“Gentlemen of the jury, every case should be tried according to law and the evidence that is admitted in the case. This is an action of negligence and negligence is defined by the law. You should not be influenced by reason of passion, prejudice or sympathy. It is your duty to judge this case without any such considerations; you should not be prejudiced against the defendant by reason of it being a corporation, and it should

have just as fair a trial as if it were a private individual.

Negligence is the omission to do something, which a reasonably prudent man, guided by those considerations which [94] usually regulate the conduct of human affairs would do, or is the doing of something which a prudent and reasonable man would not do. It is not intrinsic or absolute but is always relative to some circumstance of time, place or person.

Negligence is of no consequence unless it was the proximate cause of the injury.

The proximate cause of an injury is that cause which in natural and continuous sequence produces the injury, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets the other causes in operation.

This definition of negligence as it relates to the cause of an accident, applies alike to the defendant and to the conduct of the deceased.

When we speak of contributory negligence of the deceased, we mean the kind of negligence above defined.

The plaintiffs have the burden of proving that the defendant was guilty of negligence. The burden is sustained when you are satisfied that the greater weight of the evidence is with the plaintiffs. When you come to consider the question of contributory negligence of the deceased, the burden of proof is upon the defendant to show that the deceased was guilty of contributory negligence, and you must be satisfied that the weight of evidence shows that the

deceased was guilty of contributory negligence before you can decide that he was.

The question whether or not there was negligence in a particular case should be determined from the circumstances and conditions, as shown in evidence, at the time, surrounding the person against whom the negligence is charged.

The negligence of a servant acting within the scope of his employment is the negligence of the master.

You are further instructed that it is the duty of a railroad company, where its tracks cross the streets of a city, to take reasonable precautions to protect against injury from the [95] movement of its engines and cars, travelers upon the same highway.

Section 486 of the Civil Code of this State provides as follows: 'A bell, of at least twenty pounds weight, must be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road, or highway, and be kept ringing until it has crossed such street, road, or highway; or, a steam whistle must be attached and be sounded, except in cities, at the like distance, and be kept sounding at intervals until it has crossed the same.

The corporation is liable for all damages sustained by any person, and caused by its locomotives, trains, or cars, when the provisions of this section are not complied with.

You are therefore instructed that, should you find from the evidence in this case that on approaching the crossing in question at the time of the accident,

there was at no time any bell rung or whistle sounded, or other warning signal given by the defendant, then such failure on the part of the defendant constituted presumptive negligence.

An ordinance of the city of Selma, fixing the maximum rate of speed at which railroad trains may be operated within the corporate limits of the city, has been introduced in evidence, and, upon the question of the alleged negligence of the defendant, you are instructed that if you find that the defendant failed to comply with such municipal ordinance at the time in question, then such failure on its part constituted presumptive negligence.

Before the plaintiff can recover, it must appear from the evidence that the accident resulting in the death of George R. Wright was caused by the negligence of the defendant, unmixed with any negligence of the deceased, for if negligence on the part of the deceased contributed in any manner, directly or approximately, to his death, there can be no recovery. [96]

You are instructed that the law is well settled that the railroad track of a steam railway must of itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for approaching trains, and that, if he sees an approaching train upon the track, or could have seen the same if he had looked, he must not place himself in a dangerous position by attempting to cross in front of it, and if when the approaching train is in plain view he attempts to cross in front thereof, and an accident happens by



which he is injured, he is guilty of contributory negligence.

You are further instructed that there is no evidence before this jury that either the fireman or engineer had any actual knowledge or notice that either Mr. Tucker or Mr. Wright were crossing or attempting to cross the railroad track in front of the approaching train, and this jury can draw no inference of negligence on the part of the defendant because of the fact that the fireman or engineer might have known of the danger in which Mr. Tucker and Mr. Wright were placed. In other words, the last chance doctrine, so-called, has no application to the facts of this case, and you are to determine this case solely under the instructions given you by the Court.

You are further instructed that the engineer and fireman had a right to assume that the driver of the truck was in possession of his faculties and would remain in a place of safety and not recklessly expose himself or Mr. Wright to danger.

It is alleged in defendant's answer in this case that the alleged death of said George R. Wright was occasioned solely and alone because of the carelessness and want of care of said deceased and the person driving and in charge of the said automobile truck.

If you find that the automobile truck was operated and driven solely by the witness Tucker, and that the deceased had no [97] control over the operation of the truck, or no right to exercise control over the same, and that he did not exercise any supervision or control over the same, then you are

further instructed that in such case the negligence of Tucker (if he was negligent) is not to be imputed to the deceased so as to constitute contributory negligence on his part; but that to sustain the defense of contributory negligence, the defendant must prove or the evidence must show personal failure, on the part of the deceased to exercise ordinary care.

In other words, if you find that the deceased, Wright, was riding in the automobile truck, driven by the witness Tucker, and that he, Wright, had neither control of nor the right to control, such driver, and that he was not exercising or assuming control over the truck or such driver at the time of the accident, then, to sustain the defense of contributory negligence on the part of the deceased, it must appear from the evidence that he, personally, as distinguished from the driver of the truck failed to exercise ordinary care at and immediately prior to the time of the accident which caused his death. But deceased was required to exercise ordinary care in approaching said crossing.

If you believe from the evidence that the defendant was negligent as alleged in the complaint, and that the death of the deceased was thereby approximately caused, without contributory negligence on his part, you will find for the plaintiffs, and assess the amount of damages they are entitled to recover.

I instruct you that the defendant is entitled to have you consider upon the question of the probable value of the decedent's life, the uncertainty of life itself, the uncertainty of health, and the uncertainty

of constant employment. It is your duty to take these elements into consideration.

I further instruct you that in considering the probable value of the life of George R. Wright to these plaintiffs, you have no right to take into consideration any possible opportunities [98] that he might have had of acquiring wealth or fortune in the future.

There have been introduced in evidence mortality or expectancy tables for the purpose of showing the probable duration of life of the deceased, and also of each of the plaintiffs.

In determining the probable length of life the deceased would have enjoyed, you are entitled to consider those mortality or expectancy tables as evidence bearing on that question, and as tending to show the ordinary experience in such cases. You may also consider these tables relative to the probable duration of the life of the plaintiffs respectively, but only for the purpose and extent of ascertaining whether their expectancy of life is or is not as great as that of the deceased. You cannot award damages to any of the plaintiffs for any period extending beyond the probable term of the life of the deceased.

It is alleged in the complaint in this action that the ages of the children of the deceased at the time of filing the complaint were eleven and thirteen years, respectively, and you are instructed that the pecuniary interest of children in the life of their parent does not necessarily end at the age of majority; and in this case, if your verdict shall be for

the plaintiff, you may allow for the probable loss of any benefit, if any, of a pecuniary value, which the children would probably have received from their father after the arrival at majority.

You have no right to take into consideration in fixing the amount of damages, any personal grief or mental distress or wounded feelings which the plaintiffs, to wit, the widow and children of said deceased, may have experienced by reason of the death of said George Reuben Wright. The sorrow and grief that his death may have caused them are not regarded by the law as proper things to be considered in a verdict for damages, and nothing can be added by way of damages on that account.

The verdict in a case of this kind is to be a practical one, [99] not a sentimental one, and it is to be arrived at pursuant to the rules of law, and should fix the damages on no other basis whatever, except the pecuniary or money loss which the said widow and children may have sustained by reason of the death of George Reuben Wright. The plaintiffs can recover nothing in this action by way of damages, except for actual pecuniary loss, and in passing upon this question of pecuniary loss, the jury are not allowed to speculate generally or indulge in presumption without regard to the general evidence in the case, but they should determine the question by the evidence which has been introduced before them.

In determining the amount of damages, it is your duty to take into consideration the loss sustained by the plaintiffs in being deprived of the support of the deceased and his comfort, and to consider the value

of the father's services to the plaintiffs, his care and labor bestowed upon his children, his ability to care for them, train and assist them and his efforts for their welfare."

The foregoing were all of the instructions given the jury.

The defendant thereupon excepted to each and every one of the instructions given by the Court and each and every part thereof, as set forth in Exception No. 11 of the Bill of Exceptions.

12.

The Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 12 of said Bill of Exceptions, as follows:

"You are instructed that the law is well settled that the railroad track of a steam railway must of itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for approaching trains, and that if he sees an approaching train upon the track, or could have seen the same if he had looked, he must not place himself in a dangerous position by attempting to cross in front of it, and if when the approaching train is in plain view he attempts to cross in front thereof, and an accident happens by [100] which he is injured, no recovery can be had against the railroad company for such an accident."

13.

The Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 13 of said Bill of Exceptions, as follows:



“You are further instructed that the direct and approximate cause of the accident in which George Reuben Wright was killed was the contributory negligence and want of care of the deceased and the driver of the truck, and your verdict therefore will be in favor of the defendant.”

## 14.

The Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 14 of said Bill of Exceptions, as follows:

“If you find from the evidence in this case that either the deceased, George Reuben Wright, or the driver of the truck, could have seen the train approaching the crossing at which the accident occurred before they attempted to cross the track upon which the train was approaching, and if the accident occurred as the result of their attempting to cross in front of the approaching train while it was in plain view, then the plaintiffs are not entitled to recover against the defendant and your verdict will be in its favor.”

## 15.

The Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 15 of said Bill of Exceptions, as follows:

“You are further instructed that if you believe from the evidence that the direct and proximate cause of the accident was the attempt on the part of George Reuben Wright, deceased, and the driver of the truck, to cross the track in front of the [101]

approaching train, or if they had listened they could have heard it in time to have stopped their truck and prevented the accident, then you are instructed that the accident was occasioned by the negligence and want of care of George Reuben Wright and the driver of the truck and that the defendant was not liable, and your verdict accordingly will be in favor of the defendant.”

## 16.

The Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 16 of said Bill of Exceptions, as follows:

“You are further instructed that as George Reuben Wright and the driver of the truck, at the time of the accident were both men of mature years and were in full possession of their senses, and if they had looked could have seen the approaching train in time to have prevented the accident, the engineer was entitled reasonably to believe that they knew of the approaching train and would, in obedience to the ordinary instinct of self-preservation, not attempt to cross the track, or pass in front of the train, but would take such steps as reasonable to prevent an accident, and the employees of the defendant company were not required to assume that they would continue in attempting to cross the track in front of the approaching train to a point which would endanger their lives and limbs, and that it was not negligence for the engineer or fireman, under the circumstances, to indulge the presumption that they would not attempt to cross the track in front of the

train, but would stop and wait for the train to pass.”

## 17.

The Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 17 of said Bill of Exceptions, as follows:

“You are further instructed that in crossing a track, which [102] is a sign of danger in itself, the law does not entitle one to speculate as to whether he will be able to cross in safety before an approaching train, and if he makes the attempt and is not successful, then I charge you that such accident is the direct and proximate result of attempting to cross the track. If, therefore, you believe in the present case that the accident to the deceased was directly occasioned by the fact that he and the driver of the truck had negligently attempted to cross the track in front of the approaching train and the accident occurred as the result of such attempt, then I instruct you, as a matter of law, that the accident was occasioned by the contributory negligence and want of care of the deceased and the driver of the truck, and your verdict will, therefore, be in favor of the defendant.”

## 18.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 18 of said Bill of Exceptions, as follows:

“Passion, prejudice and sympathy are not to enter into your consideration of this case. It is your duty to judge this case uninfluenced by any consideration

of passion or prejudice and unaffected by any sympathy whatsoever.”

19.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 19 of said Bill of Exceptions; as follows:

“The fact that the Southern Pacific Company is a corporation is not to be considered by you in this case. It is your duty to give that defendant the same fair trial as if it were a private individual.”

20.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception [103] No. 20 of said Bill of Exceptions, as follows:

“Before the plaintiff can recover, it must appear from the evidence that the accident resulting in the death of George Reuben Wright was caused by the negligence of the defendant, unmixed with any negligence of the deceased or the driver of the truck, for if negligence on the part of the deceased or the driver of the truck contributed in any manner, directly or approximately to the death of said George Reuben Wright, there can be no recovery, and your verdict must be for the defendant.”

21.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 21 of said Bill of Exceptions, as follows:

“You are further instructed that a railroad track

upon which trains are run is itself a warning to any person who has reached the years of discretion and who is possessed of ordinary intelligence, that it is not safe to cross it without the exercise of constant vigilance in order to be made aware of the approach of a train and thus enabled to avoid receiving an injury, and the failure of such person so situated with reference to a railroad track to exercise such care and watchfulness and to make use of all his senses in order to avoid the danger incident to such situation is negligence and prevents recovery. If you find, therefore, that if either the deceased or the driver of the truck, in attempting to cross the railroad track in front of the approaching train which collided with said truck, failed to exercise such care and watchfulness, or to make use of all his senses in order to avoid the danger incident to crossing said track, then I instruct you that the plaintiffs cannot recover, and your verdict will be in favor of the defendant."

## 22.

That the Court erred in refusing to charge the jury as [104] requested in writing by the defendant, as set forth in Exception No. 22 of said Bill of Exceptions, as follows:

"You are further instructed that as a railroad track is a sign of danger in itself, that it was the duty of the deceased and of the driver of the truck, in approaching the track upon which the accident occurred, to exercise constant vigilance and watchfulness and care in order to see or hear an approaching train, and thus avoid injury, and if, for any rea-



son, they could not see the approaching train because their vision was obstructed, they were required to use all the more vigilance for that reason, and in any event, the law cast upon them the duty to approach the track so slowly as to give them complete control of their truck and enable them to stop instantly if occasion required. If, therefore, you believe from the evidence that either George Reuben Wright or the driver of the truck, in attempting to cross the track in front of the approaching train, did not exercise the same caution herein stated, then they were guilty of negligence themselves and no recovery can be had against the defendant.”

## 23.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 23 of said Bill of Exceptions, as follows:

“If you believe from the evidence that either George Reuben Wright, deceased, or the driver of the truck, either saw or heard the train approaching and undertook to cross ahead of it, that such attempt is conclusive evidence of negligence on his part, and the plaintiffs cannot recover.”

## 24.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 24 of said Bill of Exceptions, as follows:

“You are further instructed that the defendant is not liable [105] for the death of George Reuben Wright unless it occurred solely by its fault and neg-

ligence, and not in any degree through the fault or negligence of the deceased."

## 25.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 25 of said Bill of Exceptions, as follows:

"You are further instructed that if you believe from the evidence that the approaching train was in plain view of either the deceased or the driver of the truck before they reached the track upon which the accident occurred, and that if either of them had looked he could have seen it before they crossed the track, or if either of them had listened he could have heard the train approaching before they crossed the track, and that if either of them had looked and listened before attempting to cross the track, he could have seen and heard the approaching train and thus avoided any danger, and that while the train was so approaching in plain view of the deceased and the driver of the truck, they attempted to cross the track in front of the approaching train, and that by reason only of any such attempt the accident occurred resulting in the death of George Reuben Wright, then I instruct you that such conduct on the part of deceased and the driver of the truck was negligence and the plaintiffs cannot recover."

## 26.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 26 of said Bill of Exceptions, as follows:

“You are further instructed that damages in such a case as this can only be given for the actual pecuniary injury or loss suffered by the wife and children of the deceased. In other words, in a case such as the present, if you find that the plaintiffs are entitled to damages, then damages can only be given for the pecuniary injury or loss the wife and children have sustained, or will sustain, [106] by the death of George Reuben Wright, and in this regard I charge you that no damage can be given to the plaintiffs for the grief or sorrow, or pain, or injury to their feelings, or for loss of society of the deceased, or for his pain or suffering, or for the loss of his comfort and protection. The law simply measures the injury complained of by the loss it has caused, or will cause, in dollars and cents. In passing upon this question you are not allowed to speculate or indulge in presumptions not warranted by the evidence, but you must determine this question solely by the evidence introduced before you. In passing upon the question of pecuniary injury or loss sustained by the plaintiff you must be governed solely by the evidence introduced; you must not indulge in conjectures or speculations not supported by the evidence.”

27.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 27 of said Bill of Exceptions, as follows:

“You are further instructed that if you believe from the evidence that the employees of the defendant company failed to give the warning of the ap-

proach of the train either by blowing the whistle or ringing the bell, yet, if you further believe that under the instructions herein given you that either the deceased, or the driver of the truck, if he had looked could have seen, or if he had listened could have heard the approaching train in time to have avoided the accident by the exercise of reasonable care, then the plaintiffs are not entitled to recover."

## 28.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 28 of said Bill of Exceptions, as follows:

"While it is true that the law permits the plaintiff to recover damages for the loss of the comfort, society and protection of the deceased, you must remember that such damages are in no way concerned [107] with the question of their sorrow, grief or mental distress because of the loss of the deceased, and you must award plaintiffs nothing in this respect. The only amount that you can give under the law so far as the comfort, society and protection are concerned is such pecuniary loss as the widow and children of said deceased may have sustained with reference to those elements, and you must therefore examined the evidence upon the subject of comfort, society and protection to determine what pecuniary loss they sustained in that regard, if any, and you cannot award plaintiffs anything at all in this case on this head of damages in excess of such pecuniary loss.

I particularly caution you in this case, as a matter

of justice to the defendant, that these plaintiffs, so far as comfort, society and protection to said widow and children are concerned, are not entitled to recover anything whatever from the defendant for any personal distress or grief or injured feelings, no matter how enduring they may be; it is only for comfort, society and protection insofar as these things stand for pecuniary loss that they can recover anything at all on this head."

## 29.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 29 of said Bill of Exceptions as follows:

"You are instructed that the circumstances that the defendant Southern Pacific Company is a corporation must in no wise affect your verdict in this case any more than if it were an ordinary private citizen. In a court of justice like this, jurors should make no difference between a corporation and an individual. The plaintiffs and the defendant are entitled to justice, and the same justice, and in determining and fixing the amount of your verdict in this case you are always to remember that the defendant corporation cannot be taxed one dollar damages except in accordance with the rules of law, and it is only to the extent that damages are recoverable under [108] the rules of law that any verdict can be rendered against the defendant. It is simply the pecuniary loss of the plaintiff, and nothing more, as such pecuniary loss is prescribed and defined by legal rules, that you can base a verdict in this case."



## 30.

That the Court erred in refusing to charge the jury as requested in writing by the defendant as set forth in Exception No. 30 of said Bill of Exceptions, as follows:

“You are further instructed that neither Mr. Wright nor Mr. Tucker had the right to depend upon the custom, or even the duty enjoined by law, of the engineer or fireman to give the customary signals of the approach of the train, as it was their duty, in approaching the crossing, to look and listen, irrespective of such signals. If, therefore, they could have seen or heard the approaching train if they had looked or listened in time to avoid the accident, then your verdict should be in favor of the defendant, even if you further believe that no warning whatever was given of the approaching train by the employees of the company.”

## 31.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 31 of said Bill of Exceptions, as follows:

“You are further instructed that if you believe from the evidence that the train was approaching the crossing at an excessive rate of speed and in violation of the ordinance, yet, that fact is immaterial if you further believe that if Mr. Wright or Mr. Tucker had looked towards the approaching train, they could have seen it at any time sufficient to have prevented the accident, then the responsibility of the

accident lies with Mr. Tucker and Mr. Wright, and your verdict must be in favor of the defendant."

32.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 32 [109] of said Bill of Exceptions, as follows:

"You are further instructed that if you believe from the evidence that the employees of the defendant were negligent, that the train was going at an excessive rate of speed, that the whistle of the engine never blew nor the bell rang, and that no warning of any kind was given to Mr. Tucker or Mr. Wright by the engineer or fireman of the train, yet, if you believe from the evidence that Mr. Wright or Mr. Tucker could have seen or heard the approaching train in time to have avoided the accident, if they had looked or listened, then your verdict must be in favor of the defendant."

33.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 33 of said Bill of Exceptions, as follows:

"You are further instructed that it was Mr. Wright's duty, in approaching the crossing, equally with Mr. Tucker's, to have looked and listened for the approaching train. If, therefore, you believe from the evidence, that if Mr. Wright had looked or listened at any time before the truck actually reached the track upon which the accident occurred, he could have seen or heard the train in time to have

avoided the accident, then your verdict must be in favor of the defendant.”

## 34.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 34 of said Bill of Exceptions, as follows:

“You are further instructed that Mr. Wright at the time of the accident was in charge and control of the truck, and therefore the negligence of Mr. Tucker at the time of the accident, if you find that he was negligent, is to be imputed and regarded as the negligence of Mr. Wright. If, therefore, you find under these instructions that Mr. Wright or Mr. Tucker were negligent at the time of the accident, then your verdict must be in favor of the defendant.” [110]

## 35.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 35 of said Bill of Exceptions, as follows:

“You are further instructed that the evidence in this case is not sufficient to justify a verdict in favor of the plaintiffs, and you will therefore render a verdict in favor of the defendant.”

Dated this 27th day of November, 1916.

L. L. CORY,  
Attorney for Defendant.

Due service of the foregoing Assignment of Errors is hereby admitted by copy this 27th day of November, 1916.

GALLAHER & ATEN,  
FRANK KAUCHE,  
Attorneys for Plaintiffs. [111]

[Endorsed]: No. 71—Civil. In the District Court of the United States, Southern District of California, Northern Division. Gertrude Wright et al., Plaintiffs, vs. Southern Pacific Company, Defendant. Assignment of Errors. Filed Nov. 28, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. L. L. Cory, Attorney at Law, First National Bank Building, Fresno, Cal., 410-414 Cory Bldg. [112]

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*In the District Court of the United States, Southern District of California, Northern Division.*

GERTRUDE WRIGHT and ORENE WRIGHT,  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant.

**Order Allowing Writ of Error.**

Upon motion of L. L. Cory, attorney for defendant, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that a writ

of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the verdict and judgment heretofore entered herein.

Dated this 28th day of November, 1916.

OSCAR A. TRIPPET,

Judge.

[Endorsed]: No. 71—Civil. In the District Court of the United States, Southern District of California, Northern Division. Gertrude Wright et al., Plaintiffs, vs. Southern Pacific Company, Defendant. Order Allowing Writ of Error. Filed Nov. 28, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. L. L. Cory, Attorney at Law, Fresno, Cal., 410-414 Cory Bldg. [113]

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*In the District Court of the United States, for the Northern Division, of the Southern District of California.*

No. —.

GERTRUDE WRIGHT and ORENE WRIGHT,  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant.



**Supersedeas Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS:

That we, Southern Pacific Company, a Corporation, as principal, and United States Fidelity and Guaranty Company, a Corporation, duly organized and existing under and by virtue of the laws of the State of Maryland, for the purpose of making and guaranteeing and becoming surety upon bonds or undertakings required or authorized by law and as such corporation authorized to do business and doing business in the State of California and elsewhere, as surety, are held and firmly bound unto the plaintiffs in the above-entitled cause, and to each of them, in the sum of twelve thousand dollars (\$12,000) to be paid to the said plaintiffs, their and each of their heirs, executors, administrators and assigns, for the payment of which sum well and truly to be made, we bind ourselves and each of us, and our and each of our successors and assigns, jointly and severally, firmly by these presents.

SEALED with our seals and dated this 25th day of November, 1916. [114]

WHEREAS, lately at a regular term of the District Court of the United States for the Northern Division of the Southern District of California, a final judgment was on or about the fifth day of May, 1916, rendered and entered in the above-entitled cause against said Southern Pacific Company, a corporation, for the sum of twelve thousand five hun-

dred dollars (\$12,500), together with legal interest thereon and costs of suit; and

WHEREAS, said Southern Pacific Company intends to and is about to apply for the allowance of a writ of error, returnable to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse said judgment of said District Court of the United States in said cause and to file said writ of error, when obtained, in the clerk's office of said court, and to apply for the issuance of a citation on said writ of error directed to said plaintiffs in said cause, citing them to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city and county of San Francisco, in the State of California, according to law within thirty (30) days from the date of said citation;

NOW, the condition of the above obligation is such that if the said Southern Pacific Company, a corporation, shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation shall be void, otherwise the same shall be and remain in full force and effect.

[Seal] SOUTHERN PACIFIC COMPANY.

By G. L. KING,  
Assistant Secretary.

UNITED STATES FIDELITY AND GUAR-  
ANTY COMPANY.

[Seal] By H. V. D. JOHNS,  
Attorney in Fact.

And W. S. ALEXANDER,  
Attorney in Fact. [115]

State of California,

City and County of San Francisco,—ss.

On this 25th day of November, 1915, before me, E. B. Ryan, a notary public in and for the city and county of San Francisco, duly commissioned and sworn, personally appeared G. L. King, known to me to be the assistant secretary of Southern Pacific Company, the corporation described in and that executed the foregoing bond, and acknowledged to me that said corporation executed the said bond.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the city and county of San Francisco, State of California, the day and year in this certificate first above written.

[Seal]

E. B. RYAN,

Notary Public in and for the City and County of San Francisco, State of California.

State of California,

City and County of San Francisco,—ss.

On this 25th day of November, 1915, before me, W. J. Cleveland, a notary public in and for the said city and county of San Francisco, State of California, duly commissioned and sworn, personally appeared H. V. D. Johns, and W. S. Alexander, known to me to be the persons whose names are subscribed to the foregoing instrument as attorneys in fact for United States Fidelity and Guaranty Company, and they acknowledged to me that they subscribed the name of United States Fidelity and Guaranty Com-

pany thereto as principal, and their own names as attorneys in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and my official seal, at my office in the city and county of San Francisco, State of California, the day and year in this certificate first above written.

[Seal]

W. J. CLEVELAND,

Notary Public in and for the City and County of San Francisco, State of California. [116]

The above and foregoing bond upon writ of error is hereby approved and the same shall operate as a supersedeas.

Dated November 28th, 1916.

OSCAR A. TRIPPET,

United States District Judge.

[Endorsed]: No. 71—Civil. In the District Court of the United States, Southern District of California, Northern Division. Gertrude Wright and Orene Wright and Ora Wright, by Gertrude Wright, Their Guardian *ad Litem*, Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. Supersedeas Bond on Writ of Error. Filed Nov. 28, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. ———, Attorney for Defendant, 828 Flood Building, San Francisco, Cal. [117]

UNITED STATES OF AMERICA.

*District Court of the United States, Southern District of California, Northern Division.*

Clerk's Office.

No. 71—CIVIL.

GERTRUDE WRIGHT et al.,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY.

**Praeceptum for Certified Copy of Transcript of Record  
on Writ of Error.**

To the Clerk of Said Court:

Sir: Please issue a certified Transcript of the Record on Writ of Error in the above-entitled case, to consist of the following papers, viz:

The Judgment-roll.

Bill of Exceptions.

Petition for Writ of Error.

Assignment of Errors.

Order Allowing Writ of Error.

Bond on Writ of Error.

Writ of Error.

Citation.

Praeceptum for Transcript.

L. L. CORY,

Attorney for Defendant and Plaintiff in Error.

[Endorsed]: No. 71—Civil. U. S. District Court, Southern District of California, Northern Division. Gertrude Wright et al., Plaintiffs, vs. Southern



Pacific Company, Defendant. Praeceptum for Certified Copy of Transcript of Record on Writ of Error. Filed Dec. 30, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [118]

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*In the District Court of the United States of America, in and for the Southern District of California, Northern Division.*

No. 71—CIVIL.

GERTRUDE WRIGHT, and ORENE WRIGHT  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant.

**Certificate of Clerk U. S. District Court to Transcript  
of Record.**

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing one hundred and eighteen typewritten pages, numbered from 1 to 118, inclusive, and comprised in one volume, to be a full, true and correct copy of the Judgment-roll, Bill of Exceptions, Petition for Writ of Error, Assignment of Errors, Order Allowing Writ of Error, Supersedeas Bond on Writ of Error and Praeceptum for Certified Copy of Transcript of Record on Writ of Error in the above

and therein entitled action, and that the same together constitute the record in said action as specified in the said Praecipe filed in my office on behalf of the plaintiff in error by their attorney of record.

I do further certify that the cost of the foregoing record is \$67.20, the amount whereof has been paid by me by the Southern Pacific Company, a corporation, the plaintiff in error herein. [119]

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Northern Division, this 26th day of January, in the year of our Lord one thousand nine hundred and seventeen and of our Independence the one hundred and forty-first.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California. [120]

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[Endorsed]: No. 2942. United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, a Corporation, Plaintiff in Error, vs. Gertrude Wright and Orene Wright and Ora Wright, by Gertrude Wright, Their Guardian, *ad Litem*, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States

District Court of the Southern District of California, Northern Division.

Filed February 26, 1917.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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*United States Circuit Court of Appeals for the  
Ninth Circuit.*

THE SOUTHERN PACIFIC COMPANY,  
Plaintiff in Error,

vs.

GERTRUDE WRIGHT et al.,  
Defendants in Error.

**Order Extending Time to March 1, 1917, to File  
Record and Docket Cause.**

Good cause appearing therefor, it is hereby ordered, that the time within which the plaintiff in error in the above-entitled action may file record and docket cause in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is extended to and including the 1st day of March, 1917.

Los Angeles, California, December 23, 1916.

TRIPPET,  
District Judge.

[Endorsed]: No. 2942. United States Circuit Court of Appeals for the Ninth Circuit. The Southern Pacific Company, Plaintiff in Error, vs. Gertrude Wright et al., Defendants in Error. Order Extending Time to File Record and Docket Cause to March 1st, 1917. Filed Dec. 27, 1916. F. D. Monckton. Refiled Feb. 26, 1917. F. D. Monckton, Clerk.

